Supreme Court
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In The

Supreme Court of the United States

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ET AL.,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION AND UNITED AIR LINES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) For the Pension Benefit Guaranty Corporation ("PBGC") to succeed under ERISA on a petition in federal district court seeking the "involuntary termination" of a defined benefit plan sponsored by a corporation on the grounds that "the plan must be terminated in order to . . . avoid . . . any unreasonable increase in the liability of [the PBGC's] fund," 29 U.S.C. § 1342(c), must PBGC prove that the plan sponsor is not financially capable of maintaining the plan?

(2) If a bankruptcy court order which compels a Chapter 11 debtor to make payments pursuant to an agreement of the debtor resolves a discrete issue regarding the debtor's obligations and is immediately effective and enforceable upon entry, is the bankruptcy court's order a "final order" rather than an "interlocutory order"?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or subsidiaries.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals, who are petitioners in this Court, were parties to the proceedings in the United States Court of Appeals for the Seventh Circuit (appellants with respect to one of the appeals resolved by the Seventh Circuit and appellees with respect to the other):

Roger D. Hall
Dennis D. Dillon
Gerard Terstiege
Eugene M. Cummings
Raymond P. Fink
James M. Krasno
William L. Rutherford

Although United Air Lines, Inc. was the primary participant in the appeals that were resolved by the Seventh Circuit, UAL Corporation, its parent company, and other related Chapter 11 debtors were also parties in the proceedings from which the order under appeal arose.

The Air Line Pilots Association, International was an appellant in one of the proceedings resolved by the Seventh Circuit and was an appellee in the other.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The October 25, 2006 opinion of the United States Court of Appeals for the Seventh Circuit, which is reported at *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006) (App. at 1-19), addresses two separate orders issued by two district court judges (the "Pension Termination Order" and the "Supplemental Pension Benefits Enforcement Order"). The Air Line Pilots Association, International's ("ALPA's") petition for rehearing was denied in an unreported order entered on November 13, 2006 (App. at 176).

The Pension Termination Order: The Seventh Circuit's opinion affirmed the June 13, 2006 decision of the Honorable Judge Joan H. Lefkow of the United States District Court for the Northern District of Illinois, Eastern Division (the "District Court") terminating the defined benefit pension plan that belonged to United Air Lines, Inc.'s ("United's") active and retired pilots (the "Pilot Plan"). This decision is reported at *Pension Benefit Guar. Corp. v. United Air Lines, Inc.*, 436 F. Supp. 2d 909 (N.D. Ill. 2006) (App. at 20-51).

Before Judge Lefkow issued her decision, the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court") denied, in part, and granted, in part, the Pension Benefit Guaranty Corporation's ("PBGC's") motion for summary judgment in a decision that was originally issued on September 21, 2005 and then modified and reissued on October 26, 2005. The modified opinion is published at *In re UAL Corp.*, 333 B.R. 802 (Bankr. N.D. Ill. 2005) (App. at 52-73). Then, after trial, the Bankruptcy Court issued an October 26, 2005 decision, which is reported at *In re UAL Corp.*, 332 B.R. 858 (Bankr. N.D. Ill. 2005) (App. at 74-85), and entered an October 26, 2005 judgment order that purported to terminate the Pilot Plan (App. at 86-87).

On February 2, 2006, the Honorable Judge John W. Darrah of the District Court vacated the Bankruptcy Court's October 26, 2005 judgment order and remanded

with instructions that the Bankruptcy Court submit proposed findings of fact and conclusions of law to Judge Lefkow. Judge Darrah's ruling is reported at *In re United Air Lines, Inc.*, 337 B.R. 904 (N.D. Ill. 2006) (App. at 88-99). On February 13, 2006, the Bankruptcy Court issued its proposed findings, which are unpublished (App. at 100-101). Then, Judge Lefkow entered the June 13, 2006 decision described above.

The Supplemental Pension Benefits Enforcement Order: The Seventh Circuit's October 26, 2006 decision also reversed a separate, unpublished order entered by Judge Darrah on February 23, 2006 (App. at 102) dismissing an appeal filed by United. Judge Darrah's order affirmed an October 6, 2005 order entered by the Bankruptcy Court (App. at 103) requiring United to pay certain supplemental pension benefits to United's retired pilots. A transcript of the October 6, 2005 proceeding that led to the entry of the order is attached (App. at 104-113). Because the October 6, 2005 order was entered to enforce a February 18, 2005 Bankruptcy Court order, the February 18, 2005 order is attached (App. at 114-115) along with relevant transcript excerpts from proceedings in which the Bankruptcy Court's ruling was announced (App. at 116-175).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on October 25, 2006. As stated above, ALPA's petition for rehearing was denied on November 13, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory provisions, which are lengthy, are set forth in the Appendix as follows: 28 U.S.C. § 158

(App. at 177-181); 29 U.S.C. § 1341 (App. at 182-202) and 29 U.S.C. § 1342 (App. at 203-213).

STATEMENT

A. Overview

This case involves the Seventh Circuit's decision to affirm the involuntary termination of the Pilot Plan, even though it was acknowledged that neither PBGC nor United produced evidence at trial demonstrating that United could not afford to continue the plan. This case also involves an error and misunderstanding of the Seventh Circuit, which reflects a disagreement among the federal circuits, as to when a bankruptcy order is final, as opposed to interlocutory. The Seventh Circuit's error allowed United to renege on its obligation to pay supplemental pension benefits (not insured by PBGC) to retired pilots even though United had failed to appeal from a final order of the Bankruptcy Court enforcing that obligation. The end result of the Seventh Circuit's decision is a flawed interpretation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") with respect to the requirements for PBGC initiated pension plan terminations and further confusion among the federal circuits as to the distinction between final and interlocutory bankruptcy orders. The Seventh Circuit's errors are devastating to the retired pilots who have lost the pension benefits they earned through their years of service to United.

United's Chapter 11 reorganization proceedings have inflicted a disproportionate amount of pain on United's retired pilots. The retired pilots have lost all of their life insurance benefits, their health care benefits have been slashed, their defined benefit pension plan has been terminated by PBGC and their supplemental pension benefits have been eliminated. Unlike United's management, who have enriched themselves with post-bankruptcy benefits, and United's other creditors, many of whom cut lucrative deals with and will profit from continued relationships

with United, the retired pilots have no realistic opportunities to recover what they have lost as a result of the massive cuts in their retirement pay.

Despite the vulnerable position United's retired pilots faced throughout United's Chapter 11 proceedings, and despite ERISA's fundamental purpose of protecting the pension expectations of American workers and preventing the unnecessary termination of pension plans, the Seventh Circuit opinion that is the subject of this petition affirmed PBGC's termination of the retired pilots' defined benefit plan under 29 U.S.C. § 1342(c) even though PBGC and United failed to introduce any proof at trial that United could not afford to continue maintaining the plan. The Seventh Circuit's ruling should be reviewed so that this Court can clarify the purpose of ERISA's termination provisions, enforce the language of 29 U.S.C. § 1342(c) and correct the fundamental flaws and unfairness of the Seventh Circuit's ruling.

The Seventh Circuit's opinion also reversed a separate Bankruptcy Court order compelling United to continue paying supplemental pension benefits while PBGC's termination action was pending. The Seventh Circuit reversed the order even though the Bankruptcy Court had made a previous ruling, which United failed to appeal, that United was required to continue paying supplemental benefits until the Pilot Plan was terminated. The Seventh Circuit's second ruling should be reviewed because it adds further confusion to the already confounding question of what is a "final order" within the context of a bankruptcy proceeding.

B. Parties Relevant To This Petition And The Pilot Plan

On December 9, 2002, United, one of the world's largest commercial airlines, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established

by Title IV of ERISA. PBGC guarantees the payment of certain, but not all, pension benefits provided by defined benefit pension plans covered under Title IV of ERISA. ALPA is the union that represents United's active pilots. Because ALPA does not represent retirees, the United Retired Pilots Benefits Protection Association ("URPBPA") was formed in December 2002 to protect the retirement benefits of pilot retirees, survivors and dependents (referred to generally as "retired pilots"). The individual defendants named in this petition are retired United Captains who serve on URPBPA's Board of Directors.

Before termination, United was the plan sponsor and administrator of the Pilot Plan. The terms, conditions and benefits provided under the Pilot Plan were negotiated by United and ALPA. Because Section 415 of the Internal Revenue Code ("I.R.C.") places a limit on the amount an employer can contribute to a "tax-qualified" pension plan on behalf of any one employee, ALPA and United negotiated letter agreements that provided mechanisms for the payment of pension benefits that exceeded I.R.C. limits. Many of United's retired pilots became eligible at retirement to receive pension benefits from the "tax-qualified" and the "supplemental" portions of the Pilot Plan.[1] Although United paid qualified pension benefits from a Pilot Plan trust, supplemental benefits were paid directly by United at the beginning of each month.

C. United Seeks Termination Of The Pilot Plan And An Agreement Is Reached Between United And ALPA

In November 2004, United announced that it would seek the termination of the Pilot Plan and its other defined benefit pension plans. In its court filings, United

[1] Although pension benefits that exceed I.R.C. limits are most often referred to as "non-tax-qualified benefits," the Seventh Circuit referred to them as "supplemental benefits." URPBPA retains the Seventh Circuit's terminology throughout this petition.

acknowledged that in order to terminate the Pilot Plan, it was required to go through a two-step process because the Pilot Plan was protected by collectively bargained agreements and ERISA. In step one, United would attempt to satisfy the requirements of 11 U.S.C. § 1113 and remove any contractual obligations that required United to maintain the Pilot Plan. In step two, United would attempt to satisfy ERISA's distress termination provisions. *See* 29 U.S.C. § 1341(c)(2)(B)(ii).

In November and December of 2004, United made a series of filings pursuant to § 1113 of the Bankruptcy Code and entered into negotiations with ALPA regarding the fate of the Pilot Plan. URPBPA sought to intervene and argued to the Bankruptcy Court that, because the retired pilots' rights to receive pension benefits were contractually vested under the collective bargaining agreements that were in effect at their retirement dates, the retired pilots had a right to participate in § 1113 negotiations regarding the modification of United's contractual obligations to maintain the Pilot Plan. The Bankruptcy Court rejected URPBPA's motion seeking the appointment of an authorized representative to represent the retired pilots and their contract rights and ruled that, although the retired pilots had a clear right to participate in any ERISA action to terminate the Pilot Plan, they had no rights under § 1113 of the Bankruptcy Code. The Seventh Circuit affirmed the Bankruptcy Court orders denying URPBPA's motion to intervene and approving the agreement that was ultimately reached between United and ALPA, *In re UAL Corp.*, 443 F.3d 565 (7th Cir. 2006), and the U.S. Supreme Court denied URPBPA's petition for certiorari. *United Retired Pilots Benefit Protection Association v. United Air Lines, Inc.*, 127 S. Ct. 189 (2006).

On December 16, 2004, United and ALPA reached an agreement regarding the Pilot Plan and other issues related to the active pilots' employment. Although the Bankruptcy Court refused to approve the first agreement, ALPA's membership ratified, and the Bankruptcy Court approved, a slightly modified version (which is known as Letter Agreement 05-01) on January 31, 2005. Paragraph

4 of the initial and revised agreements stated that ALPA would not "oppose the Company's efforts to terminate the A Plan[2] under 29 U.S.C. § 1341(c)" as long as United did not seek to terminate the Pilot Plan before May 2005. However, both versions of the agreement also stated that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341 and stated that "nothing in this Letter of Agreement shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated."

D. PBGC Files Its Petition For Involuntary Termination Of The Pilot Plan Even Though PBGC Had Opposed United's Efforts To Terminate The Plan

On December 30, 2004, PBGC filed a complaint in the District Court seeking the "involuntary termination" of the tax-qualified portion[3] of the Pilot Plan under 29 U.S.C. § 1342(c). The complaint was motivated by PBGC's alleged belief that the proposed agreement between ALPA and United would ultimately lead to the termination of the Pilot Plan. PBGC's complaint alleged that "the [Pilot] Plan must be terminated and the PBGC appointed trustee to avoid an unreasonable increase in the liability of the PBGC insurance fund." PBGC sought to have December 30, 2004 established as the date of the Pilot Plan's termination. Judge Lefkow of the District Court referred PBGC's complaint to the Bankruptcy Court and, shortly thereafter, URPBPA and ALPA intervened.

Ironically, at the time PBGC filed its termination complaint, it was vigorously protesting United's efforts to

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[2] The "A Plan" is synonymous with the "Pilot Plan."

[3] The PBGC has consistently maintained that it has no interest or involvement in proceedings related to United's obligation to pay supplemental pension benefits (see, e.g., App. at 120).

terminate the Pilot Plan and its other pension plans. On December 30, 2004, the same day PBGC filed its complaint seeking the termination of the Pilot Plan, PBGC filed an objection to the ALPA-United letter agreement. In support of its objection, PBGC's financial expert, Michael Kramer ("Kramer"), completed an expert report criticizing United's financial experts. The Kramer Report stated that United's financial models were overly conservative and Kramer took issue with United's assertions that it needed to terminate all four of its defined benefit pension plans in order to attain adequate cash flow and attract exit financing. Kramer demonstrated that American Airlines, which has maintained its defined benefit plans, obtained a leveraged loan in December 2004 even though it had a cash balance that was significantly lower than the cash requirements in United's financial model. Kramer explained that United had failed to consider alternatives to plan termination or take measures to suspend short-term plan funding obligations, like freezing the accrual of new benefit obligations and obtaining minimum pension contribution waivers from the IRS.

E. The Bankruptcy Court Orders United To Continue Paying Supplemental Pension Benefits Until The Pilot Plan Is Terminated By Court Order

Despite United's commitment in section 4(c) of Letter Agreement 05-01 that the Pilot Plan would "remain in full force and effect," on February 3, 2005, just four days after the agreement was approved, United mailed letters to its retired pilots informing them that United had made a unilateral decision to suspend payment of supplemental pension benefits. Although the letter stated that United's decision to suspend supplemental pension payments was prompted by PBGC's filing of its involuntary termination complaint, and the possibility that the Pilot Plan would be terminated "retroactively" as of December 30, 2004, United knew about the PBGC action for the entire month

Letter Agreement 05-01 was revised, renegotiated, ratified and approved.

ALPA and URPBPA both filed pleadings seeking to enforce United's obligation to pay supplemental benefits and, after United responded, the Bankruptcy Court conducted a hearing on February 18, 2005. During oral argument, the court rejected United's arguments and stated that the only reasonable interpretation of the "full force and effect" language in section 4(c) of Letter Agreement 05-01 required United to continue paying supplemental benefits until there was a court order terminating the Pilot Plan (App. at 173). The court noted that United's interpretation of a separate agreement requiring United to pay supplemental pension benefits was "an argument that has no colorable basis in the collective bargaining agreement," (App. at 137) and when United argued that it had the right to suspend payment of supplemental benefits because of the possibility that the court would order a December 30, 2004 termination date for the qualified portion of the Pilot Plan, the court made it clear that PBGC's statutory right to seek a "retroactive termination date" was "pursuant to regulations that are applicable to the qualified plan" (App. at 137). The court told United that until the qualified portion of the Pilot Plan is terminated, "there is an ongoing contractual obligation to pay nonqualified plan payments" and that "[t]here is nothing that erases that obligation because of a potential for an event taking place in the future" (App. at 138). The court also ruled that "[a] denial of that obligation [to pay supplemental pension benefits] by United would be a modification of the CBA prohibited under Section 1113" of the Bankruptcy Code (App. at 171-172).

The Bankruptcy Court entered a February 18, 2005 order compelling United to "continue payment of nonqualified benefits (as described in the motion) until the A Plan is terminated pursuant to applicable law or the parties agree otherwise" (App. at 114-115). United did not appeal the order, even though the order stated that "the terms of this Order shall be immediately effective and enforceable upon entry" (App. at 115). Rather, United

complied and continued paying supplemental pension benefits.

F. PBGC's Motion For Summary Judgment And The Plan Termination Trial

(1) The Bankruptcy Court's Summary Judgment Ruling Required PBGC To Prove Its Case Under 29 U.S.C. § 1342(c) At Trial

On May 20, 2005, the Bankruptcy Court gave PBGC leave to file a motion for summary judgment regarding (1) whether the standard of review in this case is an "arbitrary and capricious" standard under the Administrative Procedures Act and (2) whether, under that standard, the administrative record supports PBGC's determination. The Bankruptcy Court entered its final, amended ruling[4] on PBGC's motion on October 26, 2005, which stated that "summary judgment must be denied because § 1342(c) requires a judicial determination that the Pilot Plan must be terminated – a question on which PBGC bears the burden of proof – not simply judicial review of the reasonableness of PBGC's decision to seek termination." *In re UAL Corp.*, 333 B.R. 802, 809 (Bankr. N.D. Ill. 2005). The court held that "because there are factual disputes over whether termination of the Pilot Plan is appropriate under those standards . . . a trial on that question is necessary . . . [and] [a]s any plaintiff in typical civil litigation, PBGC will have the burden of proof at trial under a preponderance of the evidence standard." *Id.* at 813.

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[4] The Bankruptcy Court orally announced its preliminary summary judgment ruling on August 26, 2005 and informed the parties that a trial would be required. The court's written opinion was issued on September 21, 2005 and, after a slight revision, was reissued on October 26, 2005.

(2) URPBPA Argues That PBGC's Failure To Offer Any Trial Evidence Regarding United's Ability To Afford The Pilot Plan Warranted A Directed Finding Against PBGC

At the September 21, 2005 trial, PBGC called two actuarial witnesses who both testified regarding the amount PBGC's unfunded benefit liabilities may increase if the Pilot Plan were terminated as of June 2005 rather than December 2004. Neither of PBGC's actuarial witnesses presented testimony regarding whether United could afford to maintain the Pilot Plan or whether the Pilot Plan was likely to terminate in an underfunded condition. PBGC's trial evidence did not include any financial analysis of United, did not demonstrate that United could not afford to continue the Pilot Plan and did not seek to introduce any testimony from its financial expert, Michael Kramer, who had previously concluded that the Pilot Plan could be maintained by United.

URPBPA made a motion at the close of PBGC's case, which was joined by ALPA, for a directed finding under Rule 52(c) of the Federal Rules of Civil Procedure. URPBPA argued that PBGC failed to satisfy its burden, under 29 U.S.C. § 1342(c), of showing that the Pilot Plan must be terminated in order to prevent an "unreasonable increase in the liability of the [PBGC's] fund" and failed to prove that United's reorganization would fail if the Pilot Plan was not terminated. The court reserved its ruling on this motion.

ALPA and URPBPA then presented testimony from their actuaries disputing the PBGC's actuarial calculations and entered the Kramer Report into evidence. URPBPA also provided testimony regarding URPBPA's "Split-Freeze Plan," a solution whereby the Pilot Plan, which had adequate assets to pay 100 percent of the pension obligations to retired pilots, could be split between retired and active pilots and then frozen. The retired pilot portion of the plan would pay qualified pension benefits to retired pilots without the need for any contributions from PBGC. Letter Agreement 05-01, which provided active

pilots with over $550 million in pension replacement benefits, would supplement what the active pilots may lose from the freezing of the plan.

Roger Hall, the President of URPBPA, testified that even if ALPA would not have contested a petition filed by United to terminate the Pilot Plan, URPBPA would defend against any attempt to terminate the Pilot Plan. Although United's attorney was present throughout the trial, United chose not to present any evidence.

During closing arguments, the attorney for PBGC argued that "the facts as of December 2004 when PBGC determined that the pilot plan should terminate . . . show without a doubt that the termination of the pilot plan was not only ***possible***, the standard that's in § 1342, but also likely, if not inevitable" (emphasis supplied). URPBPA renewed its Rule 52(c) motion for a directed finding and argued that, if PBGC's position in the case were accepted, and any increase in a defined benefit plan's liability would entitle PBGC to a § 1342(c) termination decree, "then the PBGC could just about terminate any plan that's out there now, regardless of the financial capabilities of the plan sponsor."

(3) The Bankruptcy Court Rules In Favor Of PBGC Despite The Kramer Report And PBGC's Failure To Introduce Evidence Regarding United's Financial Condition

On September 27, 2005, the Bankruptcy Court held a status conference and made preliminary observations regarding the evidence that had been presented and the law. The court interpreted 29 U.S.C. § 1342(c) as requiring PBGC to prove "both a substantial increase in dollar amount or percentage in PBGC's liability and a likelihood that the plan will eventually require termination" and stated that PBGC had satisfied that standard by a preponderance of the evidence. With respect to the "substantial increase in liabilities" factor and the competing actuarial testimony, the court stated that "regardless of which set of numbers is used, there is, in fact, a substantial amount of increase

in liability for PBGC's fund." In addressing the "likelihood of plan termination" factor, the court stated that although that issue was not the "primary focus of the evidence that was adduced at trial . . . the only evidence that was adduced at trial makes it more likely than not that the plan termination would take place." The Bankruptcy Court based its comments not on trial evidence, but instead on (1) statements United made outside of the involuntary termination proceedings regarding its ability to pay for the Pilot Plan and (2) the factual "context" that led United to enter into Letter Agreement 05-01.

On October 26, 2005, the court issued its written opinion, *In re UAL Corp.*, 332 B.R. 858 (Bankr. N.D. Ill. 2005), and entered an order to terminate the Pilot Plan and to appoint PBGC as the statutory trustee of the Pilot Plan (App. at 86-87). The court stated that in order to obtain a § 1342(c) termination decree, PBGC was required to prove that (1) the increase in PBGC's liability is "monetarily significant" and (2) that the Pilot Plan was "likely to terminate in an underfunded condition, so that the increase in liability would be reflected in an actual additional loss for the PBGC's insurance fund." *UAL Corp.*, 332 B.R. at 862-63. The court explained that "even if the PBGC's liability does increase significantly, the increase will not lead to a loss to PBGC if the plan is able to continue in operation successfully, through increased future contribution from the plan sponsor or otherwise." *Id.* at 864. An "increase in liability in this situation would not be 'unreasonable.' " *Id.* The court pointed out that Congress amended § 1342(c) in 1980 and changed the standard from "further increase" to "unreasonable increase." *Id.* This amendment reflected that "Congress necessarily recognized the possibility that PBGC could be required to accept certain increases in liability arising from continued operation of underfunded plans." *Id.*

The court maintained that the increases in the Pilot Plan's liabilities after December 2004 were monetarily significant and the Pilot Plan was likely to terminate in an underfunded condition. In ruling on the likelihood of termination, the court stated that

> the only evidence bearing on the issue indicates that the Pilot Plan would not continue. PBGC's administrative record reflected United's repeated statements in this case that termination of all of its defined benefit plans would be necessary for it to reorganize successfully, and United's agreements with ALPA and the PBGC[5] contemplated such a termination. Accordingly, even though no witness testified on the subject, PBGC sustained its burden of establishing the likelihood of plan termination.

Id. In addition, the court stated that URPBPA's Split Freeze Plan was not an alternative to plan termination that could be successfully implemented. *Id.* at n.3.

G. The Proceedings That Led To The District Court's Termination Order

(1) Judge Darrah Reverses The Bankruptcy Court's Termination Order And Requires The Bankruptcy Court To Issue Proposed Findings Of Fact And Conclusions Of Law

On February 2, 2006, Judge Darrah reversed the Bankruptcy Court order and held that, because the involuntary termination action filed by PBGC was a "non-core" proceeding, the Bankruptcy Court should have submitted proposed findings of fact and conclusions of law to Judge Lefkow rather than entering judgment. *In re United Air Lines, Inc.*, 337 B.R. 904 (N.D. Ill. 2006). On February 13, 2006, the Bankruptcy Court issued its proposed findings and legal conclusions and recommended the termination of the Pilot Plan (App. at 100-101). URPBPA filed a response

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[5] On May 11, 2005, the Bankruptcy Court entered an order approving a settlement of the bankruptcy claims PBGC would assert against United in the event United's defined benefit plans terminated. In approving the agreement, the court did not make any findings regarding United's ability to maintain any of its pension plans and the court did not find that United or PBGC had satisfied any of ERISA's termination requirements.

arguing that PBGC failed to prove United could not afford the Pilot Plan and the Bankruptcy Court impermissibly softened the legal standard PBGC was required to satisfy under 29 U.S.C. § 1342(c) by holding that PBGC was required to show that the Pilot Plan was "likely to terminate in an underfunded condition" when the statutory language actually requires PBGC to prove that a plan "***must*** be terminated in order to . . . avoid . . . any ***unreasonable*** increase in the liability of the [PBGC's] fund" (emphasis supplied).

(2) Judge Lefkow Terminates The Pilot Plan

On June 13, 2006, Judge Lefkow issued a memorandum opinion accepting the Bankruptcy Court's recommendations as modified and an order terminating the Pilot Plan. *Pension Benefit Guar. Corp. v. United Air Lines, Inc.*, 436 F. Supp. 2d 909 (N.D. Ill. 2006). Although Judge Lefkow agreed that the Bankruptcy Court impermissibly lowered the applicable standard of proof, she held that "[b]ecause the evidence presented to the bankruptcy court established that the Pilot Plan would terminate, this alteration of the standard does not affect the outcome of this involuntary termination proceeding." *Id.* at 924.

Similar to the Bankruptcy Court, Judge Lefkow held, first, that the increase in PBGC's liability from December 2004 to June 2005 of $84.2 million was "monetarily significant" when "measured in the context of the PBGC's economic position, the dollar amount of the PBGC's increased liability, and the ability of the PBGC to avoid that liability" and, second, that "the uncontroverted evidence at trial demonstrated that the Pilot Plan would not continue." *Id.* Judge Lefkow observed that "[a]lmost all of the evidence at trial focused on the extent of the loss that PBGC's fund would assume if the termination of the Pilot Plan did not occur until after December 30, 2004." *Id.* at 921. In addition, she expressed concern regarding the fact that PBGC "did not have a witness to testify as to whether the Pilot Plan would terminate or the financial condition of United" and she admitted that "the evidence that the

Pilot Plan would terminate was somewhat sparse." *Id.* at 921-22. But she stated that "the bankruptcy court took judicial notice of matters of public record, which, taken together, support the reasonable inference that the Pilot Plan would terminate." *Id.* at 921. These "matters of record" showed that: (1) United had been in bankruptcy since December of 2002; (2) United had announced that it needed to terminate all of its pension plans; (3) United had initiated § 1113 proceedings as part of its effort to terminate the Pilot Plan; and (4) United's August 2004 business plan did not provide for pension contributions. *Id.*

H. Additional Proceedings Regarding United's Obligation To Pay Supplemental Pension Benefits

(1) The Bankruptcy Court Enters An Order Requiring United To Continue Paying Supplemental Pension Benefits For October 2005 And Judge Darrah Dismisses United's Appeal

From February 18, 2005 (when the Bankruptcy Court ordered United to continue paying supplemental pension benefits until the Pilot Plan was terminated) until September 2005, United continued paying supplemental benefits at the beginning of each month. As a result of the Bankruptcy Court's September 27, 2005 preliminary comments, United withheld payment of the October 2005 supplemental pension benefits. ALPA and URPBPA filed a joint, emergency motion to compel the continued payment of supplemental benefits and the motion was granted on October 6, 2005 (App. at 103). At the motion hearing, the court stated that, because it had not yet issued an order terminating the Pilot Plan, and because it ruled on February 18, 2005 that United has an obligation to continue paying supplemental pension benefits until the Pilot Plan had been terminated, United was still required to pay the October 2005 supplemental pension benefits (App. at 109). The court told United's attorney:

> If you thought I was wrong in February or whenever I ruled on this issue, the same issue when it came up before, Mr. Seligman, I think it would

> have been appropriate to take some kind of appeal then, and maybe your position as a legal matter would have prevailed . . . But you didn't take an appeal then. . . . I am being asked to simply apply the same ruling that I applied then. And you're basically making the same argument you made then.

(App. at 107-108).

Although United appealed the October 6, 2005 order, on February 23, 2006, Judge Darrah entered an order dismissing United's appeal. Judge Darrah's order read, in its entirety, as follows:

> On February 2, 2006, this Court, in a Memorandum Opinion and Order in case number 05-C-6955, reversed the Bankruptcy Court's October 26, 2005 order terminating the United Air Lines Pilot Defined Benefit Pension Plan. Appellant claims the termination of the plan as a basis for this appeal. United's appeal of the October 6, 2005 order is, therefore, dismissed for lack of ripeness.

(App. at 102). United then appealed Judge Darrah's February 23, 2006 order to the Seventh Circuit.

(2) The Bankruptcy Court Compels United To Pay Supplemental Pension Benefits For November 2005 Through January 2006 And Judge Darrah Affirms

As a result of Judge Darrah's February 2, 2006 order vacating the Bankruptcy Court's October 26, 2005 pension termination order, URPBPA and ALPA also filed motions to compel the payment of supplemental benefits for November 2005 through March 2006. United filed a written response arguing that its plan of reorganization ("POR"), which was confirmed on January 20, 2006, absolved United of any responsibility for paying supplemental pension benefits after the POR's February 1, 2006 "effective date." On March 17, 2006, the Bankruptcy Court ruled that United was required to make supplemental

pension payments for November 2005 through January 2006, but that "United has no obligation to pay non-qualified benefits after January 31, 2006."

URPBPA, ALPA and United all appealed the Bankruptcy Court's March 17, 2006 order, and on August 30, 2006, District Court Judge Darrah affirmed. *In re UAL Corp.*, 2006 WL 2560846 (N.D. Ill. Aug. 30, 2006). URPBPA, ALPA and United have all appealed Judge Darrah's ruling to the Seventh Circuit. These appeals are pending.

I. The Seventh Circuit Affirms The Pension Termination Order And Reverses The Bankruptcy Court Order Requiring United To Pay October 2005 Supplemental Pension Benefits

The Seventh Circuit issued its opinion, *In re UAL Corp.*, 468 F.2d 444 (7th Cir. 2006), on October 25, 2006. In the opinion, the Seventh Circuit did not address issues related to the proper interpretation of 29 U.S.C. § 1342(c) or the nature of the proof PBGC submitted at the pension termination trial. In fact, the Seventh Circuit stated that "[t]he question that Judge Lefkow had to resolve was not whether United's plan will terminate . . . but what the effective day of that termination would be." *Id.* at 451. Ultimately, the Seventh Circuit determined that the December 30, 2004 termination date ordered by Judge Lefkow was correct.

In addition, the Seventh Circuit overruled the Bankruptcy Court's October 6, 2005 order regarding supplemental pension benefits and stated that "United therefore is not required to make the payments for October 2005 or later months." *Id.* at 455. In reaching this conclusion, the Seventh Circuit assumed that the Bankruptcy Court's February 18, 2005 order was interlocutory, not a final order as URPBPA and ALPA had argued.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because The Seventh Circuit's Opinion Is Fundamentally Flawed And Unfair And, If Not Corrected, Will Adversely Affect The Rights Of Retirees To Contest Pension Plan Terminations.

The Seventh Circuit's opinion is fundamentally flawed because the court rejected URPBPA's entire appeal based upon a significant, incorrect factual assumption (that the requirements for an ERISA distress termination had already been met) even though there were no facts in the record to support this assumption. The opinion also misinterprets the Seventh Circuit's previous opinion regarding the Pilot Plan, assumes that retirees have no right to contest an ERISA termination when a union (who does not represent those retirees) agrees not to contest plan termination, misinterprets Letter Agreement 05-01 and fails to provide any compelling analysis regarding the most critical legal issues raised by the parties and addressed by the Bankruptcy and District Courts. The fundamental unfairness of the Seventh Circuit's opinion cries out for a remedy that only this Court can provide.

Many of the Seventh Circuit's critical errors appear in the paragraph where the court attempts to correct Judge Lefkow by describing the issue she supposedly should have addressed in her opinion. *Id.* at 451. Here, the Seventh Circuit stated that the "question Judge Lefkow had to resolve was not whether United's plan will terminate . . . but what the effective day of that termination would be." *Id.* The court's assumption that this is the critical issue, rather than the issues addressed by the District and Bankruptcy Courts, is premised upon the court's assertion that whether PBGC proved its termination case at trial did not matter because "***the requirements for a distress termination have been met no matter what the PBGC thinks***" (emphasis supplied). *Id.* But this assertion is absolutely incorrect. United did not pursue or obtain a termination of the Pilot Plan under ERISA's distress termination procedures outlined at 29 U.S.C. § 1341(c)(2)(B)(ii).

Rather, United waited for the PBGC's involuntary termination proceeding to run its course. There were no facts in the record to support the Seventh Circuit's statement that "the requirements of a distress termination have been met." Furthermore, none of the parties nor the three judges from the Bankruptcy and District Courts ever suggested that United had even tried to satisfy ERISA's distress termination standard. There is no clue in the opinion how the Seventh Circuit reached this erroneous conclusion.

Based on its assertion that the distress termination standard had been met, the Seventh Circuit brushed aside URPBPA's appeal of Judge Lefkow's pension termination order. The court never even addressed issues regarding the interpretation of 29 U.S.C. § 1342(c) or PBGC's failure to prove that United could not afford the Pilot Plan, because, according to the court, the "retired pilots' appeal fails to reckon with the limits of this litigation." *Id.* The retired pilots were effectively prohibited from exercising their appellate rights.

The Seventh Circuit also stated that any attempt on URPBPA's behalf to stop the termination of the Pilot Plan was "water under the bridge" because the Seventh Circuit had already ruled, in *In re UAL Corp.*, 443 F.3d 565 (7th Cir. 2006), that "United and ALPA were entitled to agree on the plan's termination." *UAL Corp.*, 468 F.3d at 451. This statement contains two fundamental flaws. First, United and ALPA never agreed to the termination of the Pilot Plan. Although ALPA agreed that it would not contest a post-May 2005 plan termination initiated by United, Letter Agreement 05-01 also requires United to prove the elements of a distress termination and states that "nothing in this Letter of Agreement shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated." Second, the Seventh Circuit's earlier decision, which it refers to as "URPBPA I," did nothing more than reiterate the Bankruptcy Court's conclusion that the retired pilots had no right to participate in negotiations aimed toward the modification of United's contractual

responsibilities to maintain the Pilot Plan. The Seventh Circuit's earlier opinion never stated that retirees, like United's retired pilots, have no right to contest an ERISA termination of the Pilot Plan.

Under the reasoning of "URPBPA II," if a union agrees not to contest a plan termination, retired employees who will be affected and who are not represented by the union have no right to contest the termination. If other courts follow this reasoning, retired employees will be completely powerless to prevent plan terminations initiated under ERISA.

II. Review Is Warranted Because The Seventh Circuit Wrongly Affirmed A Pension Termination Order That Was Entered Based Upon An Interpretation Of ERISA That Conflicts With Congressional Intent.

The fundamental problem with the Bankruptcy Court and District Court interpretations of 29 U.S.C. § 1342(c) and the standard PBGC must meet in order to involuntarily terminate a pension plan is that both courts treat a plan sponsor's desire or intent to seek the termination of a defined benefit plan as evidence that the plan is "likely to terminate" or "would terminate." What both courts have missed is that, in order to demonstrate that a pension plan must be terminated, PBGC must prove that the employer's financial condition has deteriorated to the point where it can no longer afford to pay its pension obligations. Any other construction of § 1342(c) is illogical and is in conflict with the legislative history of § 1342(c) and the most essential purposes served by ERISA.

PBGC's core responsibility under 29 U.S.C. § 1302(a), and the primary purpose of Title IV of ERISA, 29 U.S.C. §§ 1301-1461, is the protection of plan beneficiaries and the prevention of unnecessary plan terminations. As stated in *Page v. Pension Benefit Guar. Corp.*, 968 F.2d 1310, 1317 (D.C. Cir. 1992) (citing *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984)), ERISA "was passed with the overwhelming purpose of protecting

the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service. The other statutory purposes – encouraging the growth of private pension plans and keeping down the costs of termination insurance for those plans – are important but necessarily secondary . . . ."

Title IV of ERISA provides three primary mechanisms for the termination of a defined benefit pension plan, the first two of which are initiated by a plan sponsor. A "standard termination" is a sponsor-initiated termination of a pension plan which occurs when plan assets are sufficient to satisfy a plan's benefit liabilities. 29 U.S.C. § 1341(b)(1)(D). A "distress termination" is a sponsor-initiated termination of an underfunded plan that is required by financial necessity. Although there are three avenues for obtaining a distress termination, depending on whether the company seeking the termination is liquidating under Chapter 7 of the Bankruptcy Code, reorganizing under Chapter 11 or outside of bankruptcy protection altogether, a reorganizing company like United is required to demonstrate that "unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside of the chapter 11 reorganization process." 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

An "involuntary termination" is a termination initiated by PBGC under § 1342. Sections 1342(a) and (c) establish a two-step process PBGC must satisfy before a defined benefit plan may be "involuntarily terminated." In step one, the PBGC is required to determine, under § 1342(a), that it has the authority to institute proceedings to terminate a plan. In step two, the PBGC is required to "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c). In order to obtain a decree terminating a defined benefit plan, PBGC is required to

satisfy the burden set forth in § 1342(c) by a preponderance of the evidence.

In this case, PBGC was required to prove at trial, under 29 U.S.C. § 1342(c), that the Pilot Plan "***must*** be terminated in order to . . . avoid . . . any ***unreasonable*** increase in the liability of the [PBGC's] fund" (emphasis supplied). The words "must" and "unreasonable" were intentionally placed in the statute to protect plan participants by elevating the standard PBGC must prove in order to obtain a termination decree. Congress did not want the courts to authorize the involuntary termination of a pension plan unless absolutely necessary for the protection of PBGC's pension insurance fund. Congress understood that, in cases like this one, the termination of a defined benefit plan can have a devastating impact on the retirees who spent their working lives earning pension benefits.

The legislative history of § 1342(c) further demonstrates that Congress wanted the language of § 1342(c) to create an extraordinary standard PBGC would be required to satisfy before a court could issue a decree involuntarily terminating a pension plan. As noted by the Bankruptcy Court in its summary judgment opinion, *see UAL Corp.*, 333 B.R. at 813, Congress rejected the original House version of § 1342(c), which would have authorized the Secretary of Labor to involuntarily terminate a pension plan after an administrative hearing, in favor of the enacted version of § 1342(c), which requires a federal district court to adjudicate the question of whether a plan "must be terminated" in court. The Bankruptcy Court also noted in its October 26, 2005 trial opinion that Congress amended the language of § 1342(c) in 1980 to change the standard PBGC was required to satisfy from "further increase" to "unreasonable increase in the liability of the fund." *UAL Corp.*, 332 B.R. at 863 n.2, 864. This demonstrates yet another instance in which Congress sought to ensure that pension plan terminations are only approved as a matter of last resort, i.e., when a plan sponsor can no longer afford to continue its plan.

But the Bankruptcy and District Courts erred by holding that PBGC's burden of proof was satisfied by demonstrating that United wanted to terminate the Pilot Plan and had taken some, but not all, of the steps required to do so. By confirming the lower courts' decisions, the Seventh Circuit has created a precedent which, if followed, will effectively reverse the burden of proof contemplated by ERISA's termination provisions and require plan participants to disprove an employer's ability to afford a plan. This is contrary to ERISA's design and will likely have a significant impact in other Chapter 11 proceedings where employers or PBGC seek to terminate pension plans.

United will inevitably argue that, even if the lower courts committed error, this Court should not review the order terminating the Pilot Plan because URPBPA's appeal is "equitably moot." United may argue that, because its plan of reorganization ("POR") was approved and has been substantially consummated, there should not be a reversal of the lower courts' orders and a reinstatement of the Pilot Plan because of the alleged financial hardship United would face. United's argument is not persuasive. The evidence demonstrates that United can afford the Pilot Plan. But if this Court reverses the termination order and if United then wants to contest affordability, it could file a petition for a distress termination of the Pilot Plan. United would not be required to file for bankruptcy protection as 29 U.S.C. § 1341(c)(2)(B)(iii)(I) allows a company outside of bankruptcy to terminate a plan under circumstances where "unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business."

United knows that it cannot demonstrate the distress termination criteria and that a petition by it to terminate the Pilot Plan would be unsuccessful. Instead, United prefers its rhetoric about its alleged financial hardship with respect to the Pilot Plan rather than having to prove the issue in court.

III. This Court Should Grant Certiorari To Resolve Circuit Court Confusion Regarding How To Determine Whether An Order Entered During A Chapter 11 Bankruptcy Proceeding Is A Final Order.

The Seventh Circuit's opinion also assumed, without analysis, that the Bankruptcy Court's February 18, 2005 order requiring United to pay supplemental benefits until the date an order was entered terminating the Pilot Plan was an interlocutory order. The Seventh Circuit failed to cite or consider authority from the Seventh Circuit and other federal circuit courts which holds that an order that fully resolves a discrete controversy, like the dispute regarding United's obligation to pay supplemental benefits, is a final order. As a result, the Seventh Circuit's opinion adds to the confusion within and amongst the various circuits regarding how a final order should be distinguished from an interlocutory order in the bankruptcy context.

This Court has recognized the importance of clear, bright line rules regarding jurisdictional issues.[6] *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 201-03, 108 S. Ct. 1717, 1721-22 (1988); *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549-56, 115 S. Ct. 1043 (1995) (Thomas, J., concurring) (noting the importance of a clear bright-line rule to ensure that judges and litigants will not waste resources determining the extent of federal subject-matter jurisdiction); *Hoagland v. Sandberg, Phoenix & Von Gontard P.C.*, 385 F.3d 737, 740 (7th Cir. 2004) (when jurisdictional rules are simple and precise, judges and lawyers are spared having to litigate over whether a court has the authority to entertain the case on the merits). But, without the benefit of this Court's assistance, the circuits have struggled to establish a uniform approach to questions regarding the

[6] Federal district courts and courts of appeals exercise appellate jurisdiction over bankruptcy court orders pursuant to 28 U.S.C. § 158.

definition of "finality" in bankruptcy and the appealability of orders emanating from bankruptcy related disputes. As Judge Easterbrook has observed in previous opinions, "[a]ppellate jurisdiction in bankruptcy cases is a murky subject." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1354 (7th Cir. 1990). The issue of what constitutes a final order and when courts are entitled to exercise appellate jurisdiction is particularly difficult in bankruptcy cases, like United's Chapter 11 proceedings, that involve a number of distinct proceedings that would constitute stand-alone lawsuits in the absence of a Chapter 11 bankruptcy filing. This Court should take this opportunity to set a definitive standard regarding the circumstances in which a bankruptcy court order becomes a "final order."

The Third Circuit has

> set forth a flexible, pragmatic approach to determining whether an order of the bankruptcy court is final considering a variety of factors including but not limited to: (1) whether the order leaves additional work to be done by the bankruptcy court; (2) whether the order implicates purely legal issues; (3) the impact of the bankruptcy court's order upon the assets of the debtor's estate; (4) the necessity for further fact-finding on remand to the bankruptcy court; (5) the preclusive effect of the district court's decision on the merits of subsequent litigation; and (6) the furtherance of judicial economy.

In re Northwestern Corp., 319 B.R. 68, 72 (D. Del. 2005) (citing *U.S. v. Pelullo*, 178 F.3d 196, 200-01 (3d Cir. 1999)). The Ninth Circuit applies an approach where finality depends upon considering the following factors: (1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) systemic interest in preserving the bankruptcy court's role as factfinder; and (4) whether further delay would cause either party irreparable harm. *In re Saxman*, 325 F.3d 1168, 1171 (9th Cir. 2003).

The Ninth Circuit has also cited commentary describing the circuit law addressing the finality of intermediate bankruptcy decisions as "hopelessly unresolved." *In re Bonner Mall Partnership*, 2 F.3d 899, 904 n.9 (9th Cir. 1993) (citing 1 Collier on Bankruptcy, ¶ 3.03[6][b], 3-192 (Lawrence King, ed. 15th ed. 1992)). The First Circuit has recognized that the finality issue in bankruptcy is "complicated" and that "no uniform and well-developed set of rules exists and on many points there is a good deal of uncertainty." *Brandt v. Wand Partners*, 242 F.3d 6, 13 (1st Cir. 2001).

The inconsistent case law shows that the circuits disagree on questions regarding the finality of bankruptcy court orders in a variety of different factual and legal contexts. For instance, the circuits are split regarding the application of Rule 54(b) of the Federal Rules of Civil Procedure to bankruptcy orders. In *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987), the Seventh Circuit excused the requirements of Rule 54(b) and held that forfeiture occurs only upon failure to appeal orders which qualify as final under the stricter standards applied in non-bankruptcy cases. According to the *Kilgus* court, if an order is final solely under the flexible approach applied in bankruptcy, there is a right, but no obligation, to appeal it at once. *Id.* at 1116-17. The Fifth Circuit's decision in *In re Wood & Locker, Inc.*, 868 F.2d 139, 144 (5th Cir. 1989), in contrast, specifically refused to follow the Seventh Circuit's approach and required full enforcement of Rule 54(b) in bankruptcy. *See also In re Yousif*, 201 F.3d 774, 778-79 (6th Cir. 2000) (requiring compliance with Rule 54(b)). Whether the February 18, 2005 order United failed to appeal was a final order is an important question here because a litigant's failure to appeal a final order places the order beyond review and all claims that could have been raised at the time the order is entered are forfeited. *See, e.g., In re Kids Creek Partners, L.P.*, 200 F.3d 1070, 1073 (7th Cir. 2000).

The circuits are split regarding how to characterize orders designating trustees and orders recognizing official representatives for parties. In *In re Klein*, 940 F.2d 1075, 1076-78 (7th Cir. 1991), the Seventh Circuit held that a bankruptcy court decision not to confirm the election of a

permanent trustee was interlocutory and, in *In re UNR Indus., Inc.*, 725 F.2d 1111 (7th Cir. 1984), the Seventh Circuit stated that an order denying a motion to appoint a legal representative for future claimants was interlocutory. On the other hand, in *In re Oxborrow*, 913 F.2d 751, 753 (9th Cir. 1990), the Ninth Circuit held that a district court order affirming the invalidation of a trustee election was a final order, and in *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 826 (1st Cir. 1990), the First Circuit held that an order appointing a chapter 11 trustee was final. In *In re Amatex Corp.*, 755 F.2d 1034, 1041 (3d Cir. 1985), the Third Circuit held that "the order denying representation to the class of future claimants is equivalent to a denial of a request to intervene, an order which is deemed final."

The lack of clarity regarding what constitutes a final bankruptcy order is also exemplified by the confusion regarding whether a court of appeals should entertain an appeal sought from a district court order remanding a bankruptcy court order. In *In re Lopez*, 116 F.3d 1191, 1192 (7th Cir. 1997), *cert. denied*, 522 U.S. 1014, 118 S. Ct. 599 (1997), the Seventh Circuit addressed such a case and stated "[w]e write to reiterate this circuit's position but also to invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal." As the Seventh Circuit explained, most of the circuits hold that a decision by a district court remanding a bankruptcy court order is not final or appealable even if the decision of the bankruptcy court was final. *Id.* Two circuits, the Third and the Ninth, and possibly one more, the Sixth, allow such an appeal if, on balance, the goal of an expeditious winding up of the bankruptcy proceeding will be furthered by allowing an immediate appeal. *Id.* The Third, Ninth and Sixth Circuits defend their approach by pointing out that finality has traditionally been conceived of in a more flexible manner in bankruptcy appeals. *See, e.g., In re Marin Motor Oil, Inc.*, 689 F.2d 445, 449 (3d Cir. 1982); *Bonner Mall*, 2 F.3d at 903; *In re Gardner*, 810 F.2d 87, 91-92 (6th Cir. 1987) *but cf. In re Frederick Petroleum Corp.*, 912 F.2d 850 (6th Cir. 1990).

A decade after the Seventh Circuit's request for clarification in *Lopez*, the case law continues to give inconsistent results to questions regarding the finality of bankruptcy court orders. Here, for instance, the Seventh Circuit has contradicted other Seventh Circuit cases which hold that a bankruptcy court order is final when it resolves a discrete dispute within a larger bankruptcy proceeding. *See, e.g., Bank of America, N.A., v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003); *In re Golant*, 239 F.3d 931, 934 (7th Cir. 2001); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *In re Oakley,* 344 F.3d 709, 711 (7th Cir. 2003). The February 18, 2005 Bankruptcy Court order that United failed to appeal resolved a discrete dispute regarding United's obligation to pay supplemental pension benefits during the time PBGC's involuntary termination action was pending. Under *Bank of America, Golant, Rimsat* and *Oakley,* and the decisions of other circuit courts, the February 18, 2005 order would have been deemed final.

In addition to the fact that the Seventh Circuit's opinion in this case is inconsistent with cases from the Seventh and other circuits, the case is also internally inconsistent. The Seventh Circuit addresses United's appeal of the October 6, 2005 order as if that order was final and appealable, but, at the same time, characterizes the February 18, 2005 order as interlocutory. There is no basis for the divergent treatment of these two orders.

The lack of clarity regarding what constitutes a final order in bankruptcy court has produced such confusion and inconsistency that many commentators have called for a unified approach. *See, e.g.,* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 Vand. L. Rev. 887, 918-19 (2000) ("[i]t is an irony of bankruptcy practice that an order may be nonappeable on finality grounds until it becomes nonappealable on mootness grounds"); John P. Hennigan, Jr., *Toward Regularizing Appealabilty in Bankruptcy*, 12 Bankr. Dev. J. 583, 584-86 (1996) (appellate jurisdiction in bankruptcy cases is a murky subject; the courts have had a difficult time in determining what is a final order and what is interlocutory); G. Eric Brunstad, Jr., *Appeals of Interlocutory*

Bankruptcy Court Orders: Resolution of a Conflict, 1 J. Bankr. L. & Prac. 475, 476 (1992) ("appeals of issues in bankruptcy matters involve an appellate scheme that remains, in certain fundamental respects, confusing and highly controversial"); Joseph Mitzel, *When is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 Minn. L. Rev. 1337 (1990); Adam D. Cole, *It Ain't Over Till It's Over: Interpreting 28 U.S.C. § 158(D) Finality for Bankruptcy Appeals to Circuit Courts*, 53 Alb. L. Rev. 889, 889-90 (1989) ("Determining finality for bankruptcy appeals, however, remains unsettled among the federal circuits.") This Court should heed the call by reviewing the Seventh Circuit's decision and establishing a clear, uniform rule as to what constitutes a final bankruptcy order.

CONCLUSION

This Petition For A Writ Of Certiorari should be granted.

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468 F.3d 444

United States Court of Appeals, Seventh Circuit.

In the Matter of **UAL CORPORATION** (PILOTS' PENSION PLAN TERMINATION).

Appeals of: United Airlines, Inc.; Pension Benefit Guaranty Corporation; Air Line Pilots Association, International; and United Retired Pilots Benefits Protection Association, et al.

Nos. 06-1867, 06-2843, 06-2662, 06-2714.

Argued Sept. 26, 2006.
Decided Oct. 25, 2006.
Rehearing Denied Nov. 13, 2006.

David R. Seligman (argued), James J. Mazza, Jr., Kirkland & Ellis, Chicago, IL, for Appellant.

Jack J. Carriglio, Eric E. Newman, Meckler, Bulger & Tilson, Chicago, IL, for United Retired Pilots Benefits Protection Association, et al.

Babette A. Ceccotti (argued), Cohen, Weiss & Simon, New York, NY, for Appellee, Air Line Pilots Association, International.

Matthew C. Luzadder, Kelley, Drye & Warren, Chicago, IL, Jeffrey B. Cohen (argued), Paula Connelly, Pension Benefit Guaranty Corporation, Office of the General Counsel, Washington, DC, for Pension Benefit Guaranty Corporation.

Chad J. Husnick, Kirkland & Ellis, Chicago, IL, for United Airlines, Incorporated.

Before BAUER, POSNER, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Earlier this year we held that United Airlines and its unionized pilots had reached a valid bargain in which the pilots' union, in order to improve United's chance of successful reorganization in bankruptcy, agreed not to oppose its termination of its defined-benefit pension plan. *In re UAL Corp. (URPBPA)*, 443 F.3d 565 (7th Cir.2006) (*URPBPA I*). In exchange for their acquiescence, the active pilots stood to receive $550 million in convertible notes in the reorganized firm, plus a new defined-contribution pension plan.

This agreement contemplated that United would maintain the defined-benefit plan through the end of June 2005, though without making additional monthly contributions to the plan's trust fund. During those months, pilots' accrued benefits would rise because of additional work credits, and an annual cost-of-living increase would kick in. When the defined-benefit plan ended, all pilots (active and retired) would continue to receive reduced monthly benefits. "Termination" of a plan does not end anyone's right to receive vested benefits; it just prevents an increase in those benefits, which will be paid from the trust and, to the extent that fund is insufficient, by the Pension Benefit Guaranty Corporation. (What the PBGC can pay is limited by 29 U.S.C. § 1322(b)(3), so vested benefits of well-paid retirees such as airline pilots are not fully insured.) Because the funds in trust for the pilots' plan at United were insufficient to pay the promised benefits, termination required the PBGC to step in with a hefty federal subsidy.

The PBGC was unwilling to underwrite the extra benefits that would become vested during the first six

months of 2005, benefits that the district court valued at approximately $84 million. It filed an adversary action in the bankruptcy proposing to terminate the plan at the end of 2004. Meanwhile United proposed to end the payment of supplemental retirement benefits, from its corporate funds, that exceeded what could be offered through a tax-qualified pension plan – which is to say, a plan the benefits of which are taxed to employees as they are paid after retirement, rather than when the work is performed and wages earned. (The parties refer to these payments as "non-qualified benefits," but that's a misnomer. Pension plans, and contributions to them, may or may not be "qualified" in the sense of deferring income tax from the time wages are earned until the pensions are disbursed; particular benefit payments always are taxable income when distributed. We therefore refer to the benefits as "supplemental," meaning supplemental to the tax-qualified pension plan, rather than as "non-qualified.") The Union (the Air Line Pilots Association, International, or ALPA) acknowledged that these benefits would end as soon as the defined-benefit pension plan terminated – for a plan's termination limits pension benefits to their vested and insured level – but the parties' agreement of January 2005 (the "Letter Agreement" for short) stipulated that this meant continuation until a court formally terminated the agreement. ALPA insists that this means the date of judicial decision, not the date of the plan's termination.

After a considerable delay caused by assignment of the PBGC's action to Chief Bankruptcy Judge Wedoff, followed by District Judge Darrah's decision (after a trial had been held in the bankruptcy court) that only a district judge could act on that non-core subject, the matter came to rest with District Judge Lefkow. She thought that $84

million would be an "unreasonable increase" in the PBGC's liability; under 29 U.S.C. § 1342(a)(4), that conclusion justified termination of the pension plan at the end of 2004. 436 F.Supp.2d 909 (N.D.Ill.2006). But Judge Lefkow did not release this decision until June 2006. Judge Wedoff, whose authority over the supplemental pension benefits was secure under 28 U.S.C. § 157(b)(1) because United's request for relief was a core proceeding, concluded in February 2005 that it must continue paying while he, then Judge Darrah, and finally Judge Lefkow, mulled over the PBGC's request to set a termination date in 2004. In October 2005 United renewed its request to cease paying – for by then the pension plan would have ended even had the PBGC not sought an earlier termination date. Judge Wedoff again denied this request but allowed United to put the supplemental retirement benefits for October and later months in a segregated account while the PBGC's suit continued. United appealed to Judge Darrah. *See* 28 U.S.C. § 158(a). He dismissed the appeal as "unripe" because final decision in the PBGC's adversary proceeding lay ahead.

We have consolidated four appeals from these decisions. The PBGC, the ALPA, and a group of retired pilots (the United Retired Pilots Benefit Protection Association, or URPBPA) have appealed from Judge Lefkow's order. United has appealed from Judge Darrah's refusal to decide whether it must pay supplemental benefits for October 2005. Judge Wedoff entered a separate order requiring United to pay supplemental retirement benefits through February 1, 2006, when its plan of reorganization took effect; the plan, Judge Wedoff held, superseded the Letter Agreement and allowed United to stop paying at last, even though Judge Lefkow still had not decided whether the

pension plan's termination date would be in December 2004 or June 2005. United appealed that decision to Judge Darrah, who affirmed on the ground that, by not taking an interlocutory appeal under 28 U.S.C. § 158(a)(3) from Judge Wedoff's order in February 2005, United had forfeited any entitlement to further review of its obligations with respect to supplemental benefits. United has filed a notice of appeal (No. 06-3489) from that decision, and both ALPA and URPBPA have filed cross-appeals (Nos. 06-3548 & 06-3559) to argue that even the confirmation of the plan did not end United's obligation to pay supplemental benefits. We have stayed briefing in those three appeals until the other appeals have been resolved, as our handling of the October 2005 supplemental benefits may well resolve the controversy about payment for ensuing months too.

Of the four appeals, the PBGC's has the distinction of not seeking any relief – for the PBGC prevailed in the district court. It proposed a termination date of December 30, 2004; the court ruled in its favor. The PBGC's nose is out of joint because the court held a trial and made its own judgment about how much extra it would have cost to keep the plan in force until the end of June 2005, and whether that amount (which the court fixed at $84.2 million, about $17 million less than the PBGC's calculation) would be an "unreasonable increase" in federal liability. The PBGC does not want to go through such a procedure again and asks us to hold that, instead of conducting an independent inquiry, the court should have limited review to the administrative record and deferred to the PBGC's evaluation. Appellate courts do not, however, review language in district judges' opinions – we review *judgments*, *see Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir.1987),

and this judgment gave the PBGC everything it wanted. A litigant that prevails at trial may not appeal to contend that it should have won faster or cheaper on summary judgment; nor may the winner at trial protest what it deems (in retrospect) to have been needless discovery or rounds of briefing en route. What the PBGC wants from us – a remand directing the district judge to write a different opinion but enter the same judgment – is not within the judicial power under Article III. Fiddling with explanatory language, when the judgment is fixed, would be advisory.

This is not to say that a prevailing litigant must abandon its views on intermediate legal questions. A winner may defend its judgment on any ground preserved in the district court, without need for a cross appeal. *See, e.g., Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 96 S.Ct. 2158, 48 L.Ed.2d 784 (1976). The PBGC takes this as a fallback position, even if Article III precludes a remand with instructions to rewrite the opinion while reentering the same judgment. So our first question is whether review should have been deferential, for if the answer is yes then we may affirm (on ALPA's and the retired pilots' appeals) without further ado.

Deference is appropriate when agencies wield delegated interpretive or adjudicatory power – the former usually demonstrated by rulemaking and the latter by administrative adjudication (which also may yield rules in common – law fashion). *See United States v. Mead Corp.*, 533 U.S. 218, 229-30, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). The PBGC did not use either rulemaking or adjudication to decide that United's plan should be wrapped up at the end of 2004. Its decision was made unilaterally and was not self-executing. The only authority that the PBGC has under § 1342 is to ask a court for relief. That implies

an independent judicial role. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). When making its decision a court must respect any regulations issued after notice-and-comment rulemaking, but the PBGC has not promulgated any rules pertinent to this subject. Nor has it issued the sort of interpretive guidelines that deserve the court's respectful consideration even though they lack the power to control. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). All the PBGC had done is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department of Justice files suit under the Sherman Act. *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). As the plaintiff, a federal agency bears the same burden of persuasion as any other litigant.

Nothing in 29 U.S.C. § 1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view. Nonetheless, the PBGC insists that we should look past the statutory language and follow *PBGC v. LTV Corp.*, 496 U.S. 633, 647-51, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990), which held that the agency receives *Chevron*-style deference (*see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) to the extent that it has issued opinions interpreting another of its statutes, 29 U.S.C. § 1347.

Section 1347 allows the PBGC to revive a terminated pension plan. This is a unilateral act; restoration does not require judicial approval, though like other agency action it may be reviewed in court under the Administrative

Procedure Act, 5 U.S.C. § 706, which requires the court to respect agency action that is not arbitrary, capricious, or in violation of law. In a series of opinion letters, the PBGC concluded that the restoration power should be used when employers create follow-on plans. A "follow-on plan" is one that wraps around the federal insurance program and gives current and retired employees substantially the same benefits they would have enjoyed had the original plan not been terminated. LTV's pension plan was underfunded by about $2.3 billion, and when the plan was terminated in LTV's bankruptcy the federal insurance fund had to make up about $2.1 billion of that shortfall. LTV and its unions then negotiated a new pension plan that, when added to the federal insurance benefits, gave workers and retirees the same retirement income they would have enjoyed had the plan not been terminated. Investors and workers thus did not share the pain; all loss from the employer's imprudently high pension promises fell on the taxpayers. The PBGC, following its long-held views, concluded that the termination-and-follow-on procedure amounted to a raid on the Treasury and restored the plan under § 1347 – a step that ended the federal insurance benefits and required LTV to make up the $2.3 billion funding shortfall on its own. The Supreme Court held that by doing this the PBGC did not contradict § 1347 or abuse its discretion.

Although the agency wants us to conclude that *LTV* entitles all of its acts to *Chevron* deference, that is not what the Court held. Section 1347 enables the PBGC to make self-executing orders, which is what leads to deferential review under the APA. Section 1342, by contrast, requires the PBGC to initiate litigation. Review under the APA differs substantially from the sort of position that an

agency must assume when, like any other litigant, it must demonstrate a preponderance of the evidence in order to prevail. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994). After *Mead* and *Christensen*, the sort of opinion letters to which the Court deferred in *LTV* would receive, not *Chevron* deference, but respectful consideration under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). As it happens, the difference between Chevron and Mead-Skidmore deference does not matter today, because the PBGC has not issued any opinion letters that bear on the disposition of this litigation. It demands deference not to its policies but to a fact-specific conclusion that the Letter Agreement between United and the ALPA exposed the insurance fund to an "unjustified increase" in liability. Section 1342(c) gives the resolution of that question to the judiciary; the PBGC participates as a litigant, not as the decision-maker.

The question that Judge Lefkow had to resolve was not whether United's plan will terminate – the requirements for a distress termination have been met no matter what the PBGC thinks, and the Letter Agreement removes the obstacle otherwise present when a collective-bargaining agreement is involved, *see* 29 U.S.C. § 1341(a)(3), (c)(2)(B)(ii) – but what the effective day of that termination would be. The retired pilots' appeal fails to reckon with the limits of this litigation. What the retirees want is nothing less than indefinite continuation of the plan. If American Airlines can afford a pension plan, the retired pilots insist, then so can United Airlines. That's water under the bridge, however. *URPBPA I* holds that United and the ALPA were entitled to agree on the plan's termination. A companion decision, released today, reiterates that conclusion in

rejecting the retired pilots' objections to the plan of reorganization, which ends any possibility of resurrecting this pension plan. *See In re UAL Corp.*, 2006 WL 3019468 (7th Cir. Oct. 25, 2006). No more need be said about the retired pilots' appeal.

While United and its unions were negotiating, United and the PBGC had their own round of discussions. An employer that terminates an underfunded plan becomes liable to the PBGC for the amount of the shortfall. 29 U.S.C. § 1362. United was in economic distress and could not satisfy that obligation in liquid assets; the PBGC agreed to accept about $1.5 billion of stock in the post-reorganization United. As part of this bargain, the PBGC agreed that United could continue three of its pension plans (those covering flight attendants, mechanics, and general office personnel) through June 30, 2005. The PBGC reserved its right to seek earlier termination of the pilots' plan under § 1342(a)(4); United, which had given the ALPA a most-favored-nations agreement (promising that it would not end the pilots' plan before the plans covering other workers) kept its bargain and refused to accede to the PBGC's demand, which led to the adversary action. Now the ALPA contends that, by accepting equity securities in lieu of cash on account of the employer's shortfall liability, the PBGC has forfeited its right to seek early termination. But how so, when the settlement agreement expressly reserved the right to seek this relief? It is not as if United topped up the pension trust to cover the additional benefits that would become vested during the first six months of 2005. It stopped contributing to the pilots' plan in 2002, when the bankruptcy began, and the offer of stock in (partial) satisfaction of the shortfall would

not have mitigated the loss to the federal insurance fund from adding six more months of vested benefits in 2005.

So is $84 million, the (net) cost to the PBGC of continuing the pilots' plan through the first six months of 2005, an "unreasonable increase" in federal liability? Reasonableness is an issue of fact and is reviewed deferentially on appeal; that reasonableness is "the ultimate issue" does not change that standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). The dispute is case-specific, which almost always implies deferential appellate review. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir.1989) (en banc).

The pilots' union maintains that $84 million is not an unreasonable increase because it is small in relation to the total obligations of the plan (several billion dollars), the assets in the PBGC's insurance fund, the cost of an aircraft carrier, or the national government's annual budget. That is not, however, the right perspective. Any number can be made to look trifling by comparing it with some much larger number, but the exercise is so easy that the comparison is unhelpful. Eighty-four million dollars is substantial by any normal calculation. The district court concluded that the right question is whether the federal Treasury receives value for money; if not, the marginal outlay is "unreasonable." This $84 million would not buy the insurance fund anything of value. Nor was it necessary to provide the pilots with a minimally satisfactory retirement: they are well compensated even after the termination, since many will receive benefits at the statutory maximum.

The incremental $84 million was a bargaining chip between United and the Union: to obtain ALPA's assent to the termination, United offered the pilots an extra six months of benefits to be underwritten by a third party, the PBGC. No wonder it objected. The deal between United and the unions exemplifies the moral hazard to which insurance gives rise. Insured parties alter their behavior to take advantage of the third-party payor; insurers must respond by making such maneuvers more difficult. That's why the PBGC proposed early termination. The district court did not abuse its discretion in concluding that any extra outlay attributable to the moral hazard created by insurance would be an "unreasonable increase" in the federal commitment, given the substantial amount that the PBGC already was committed to pay toward the pilots' benefits.

Once the PBGC files suit, the district court sets the termination date. 29 U.S.C. § 1348(a)(4). The pilots' union maintains that December 30, 2004, is too early even if June 30, 2005, is too late, but the district judge was not required to split the difference between the ALPA and the PBGC. That United had promised the Union not to agree to a date before June 30 does not affect either the PBGC or the court, for they are strangers to the bargain.

As for the supplemental payments: these end with the defined-benefit plan, which means that nothing is due for October 2005 or later. (United has not proposed to recapture payments disbursed for January through September 2005.) When Judge Darrah dismissed United's appeal as "unripe," Judge Lefkow had not yet made her decision, so Judge Darrah could not be sure where in the range December 2004 through June 2005 the pilots' plan would end, but any of the possible dates came before October 2005, so

it is unclear why Judge Darrah thought the appeal premature. If the supplemental benefits end at the plan's termination, then reversal was in order; if, as ALPA insists, the benefits continue until a court makes the final decision, then affirmance was in order (for the termination-date dispute remained unresolved as of October 2005); it is impossible to understand why Judge Darrah thought that there was nothing to do but dismiss the appeal.

Indeed, it is impossible to see how an appeal *ever* could be dismissed as "unripe," and Judge Darrah did not cite any statute or case law in support of his decision. Ripeness is a quality of *disputes*, not of appeals. If the dispute about whether United must pay the supplemental benefits for October 2005 was not ripe for resolution, then the district court should have vacated Judge Wedoff's decision as premature. For appellate tribunals (including district judges deciding appeals in bankruptcy), the relevant doctrine is finality, not ripeness. *See United States v. Jose*, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996). If the *order* is final, then an appeal is proper whether or not the *dispute* is ripe for resolution. A timely appeal filed after premature action by the lower court can lead to one of two actions: the appellate body vacates the premature decision, or the appellate body keeps the dispute under advisement until it becomes ripe and a decision properly may be rendered. *See Buckley v. Valeo*, 424 U.S. 1, 114-17, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (dispute resolved on the merits on appeal, even though the controversy was not ripe at the time the district court acted). If the dispute is ripe, then it must be resolved on the merits – as Judge Darrah later was to do for the months November 2005 through January 2006, even though Judge Lefkow still had not fixed the plan's termination date.

Dismissal of the appeal, leaving the aggrieved party without recourse (it can't file a second notice of appeal later, for the time to appeal will have expired), is the one impermissible outcome, expressly forbidden by *Jose*.

It is unnecessary to remand, since we can resolve this legal dispute as easily as the district court could (and without the need for a second round of appeals). There are three possible resolutions. First, United's obligation to pay supplemental benefits may end with the plan, and if that is so then it need not pay supplemental benefits for October. Second, United's obligation may continue as long as the dispute about the termination date is still in litigation, and if that is so then United must pay supplemental pension benefits for October 2005. Third, United may have forfeited its legal rights by failing to appeal in February 2005, and again this means that it must pay the October benefits. It is this third conclusion that Judge Darrah reached when he resolved the appeal with respect to benefits for November through January, *see* 2006 U.S. Dist. Lexis 66305 (N.D.Ill. Aug. 30, 2006), and that ALPA urges us to adopt with respect to the October 2005 benefits.

Lawyers often argue that failure to take an available interlocutory appeal forfeits any opportunity to present the argument later, but this proposition has not fared well. *See, e.g., United States v. Clark*, 445 U.S. 23, 25 n. 2, 100 S.Ct. 895, 63 L.Ed.2d 171 (1980) (citing lots of earlier decisions holding that failure to take an interlocutory appeal does not waive or forfeit any legal position); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir.1988). Thirty years ago we called "frivolous" an argument that failure to take an interlocutory appeal forfeits the litigant's position. *Tincher v. Piasecki*, 520 F.2d 851, 854 n. 3 (7th Cir.1975).

It has not gained support in the intervening years, so it is surprising to see it adopted by a district judge – whose terse opinion does not cite any authority. Litigants bypass opportunities for interlocutory review all the time. For example, a decision to issue (or deny a motion for) a preliminary injunction is an appealable order, but a litigant who decides to accept defeat at that stage and proceed straight to resolution of the permanent injunction does not thereby give up all chance of prevailing on the merits. *Retired Chicago Police Association v. Chicago*, 7 F.3d 584, 608 (7th Cir.1993). Likewise public officials who could appeal before trial to present claims of official immunity need not do so, and they may raise an immunity defense on appeal from the final decision. That's the holding of *Kurowski*. As we remarked there (848 F.2d at 773):

> The privilege to take an interlocutory appeal exists for the appellant's protection. Such appeals come at great cost to the judicial system because they may prolong litigation and require appellate courts to cope with each case more than once. Most interlocutory appeals end in affirmance (thus entail wasted motion), because district judges dispose correctly of the vast majority of motions. If the aggrieved party is content to swallow his losses and proceed with the case . . . no interest of either the judicial system or the adverse party is served by treating the whole subject as forfeit. That would simply induce [litigants] to file more interlocutory appeals.

Just so with interlocutory appeals in bankruptcy. If United was willing to pay the supplemental retirement benefits for February 2005, and let the subject slide until October, that was its own loss (and the retirees' gain); a

legal rule declaring the legal position lost forever would lead prudent lawyers to file appeals early and often, pouring molasses on the judicial process.

Thus the only remaining question is whether the Letter Agreement between United and ALPA compels United to pay supplemental retirement benefits until the judiciary sets the termination date. The Letter Agreement provides that the pilots' plan will terminate at the close of June 2005, and that until the court acts – for termination of an underfunded plan at the employer's behest requires judicial approval under 29 U.S.C. § 1341(c)(2)(B)(ii) – the plan "shall remain in full force and effect". (Although the Letter Agreement does not refer to the supplemental benefits, everyone assumes that their treatment matches that of regular pension benefits.) The Agreement's "full force and effect" clause applies until all appeals from the bankruptcy judge's decision about the distress termination have been exhausted, or the plan of reorganization has come into force. This is the language that, as the ALPA sees things, requires the continuation of supplemental benefits until February 1, 2006, when the plan of reorganization took effect.

The problem with this line of argument is that, by the time the bankruptcy judge approved the Letter Agreement, the PBGC had taken matters out of United's hands by asking the court to terminate the pension plan earlier. There never was to be a proceeding under § 1341(c)(2)(B)(ii). Nor was termination to wait until some judicial decision or appeal; what the PBGC wanted – and what the district court gave it, properly we have just held – is retroactive termination. That pulled the rug out from under the Letter Agreement's fundamental assumption about timing. United and the ALPA spoke only for themselves; they

could not speak for the court, the PBGC, or United's other unsecured creditors. If, as the parties have agreed, the supplemental benefits end with the pension plan, the only possible date for that cessation is December 30, 2004.

Section 1342(a)(4) allows a court (at the PBGC's request) to override private agreements. *See also In re UAL Corp.*, 428 F.3d 677 (7th Cir.2005) (holding that action of the PBGC overrode the pension clauses in a collective bargaining agreement between United and the flight attendants' union). United and its unions lacked authority to set a termination date once the PBGC intervened, and a side agreement that all benefits persist until a privately selected termination date is untenable when the court sets its own date. Maintaining the supplemental benefits – which are defined as the difference between the contractually agreed pension payments and what an ERISA plan can provide – after the Plan's termination date would make the supplements a kind of follow-on plan, designed to maintain the retirees' position (through the plan of reorganization) while transferring as much of the obligation as possible to the public fisc. For the reasons given in *LTV*, that is incompatible with the PBGC's insurance function.

Indeed, the "full force and effect" clause of the side agreement is untenable (as applied to the supplemental benefits) quite apart from § 1342(a)(4). The supplemental benefits were deferred compensation for labor the retired pilots furnished before United entered bankruptcy. The retirees were unsecured creditors with respect to these benefits. The defined-benefit pension plan itself was supported by a trust fund, but because paying these extra benefits through the trust would have cost both United and the pilots the value of tax deferral, these supplemental

payments were kept separate from the trust. As a debtor in bankruptcy, United had no power to pay one group of unsecured creditors in full while sending most others away with less than 10¢ on the dollar, and the bankruptcy court lacked authority to approve any such preference over protest. *See In re Kmart Corp.*, 359 F.3d 866 (7th Cir.2004). No one has argued that the court's authority to classify debts would support a difference of this magnitude. Nor can the supplemental benefits be paid in full as current wages covered by the priority in 11 U.S.C. § 507(a)(3)(A) (preference for wages, not to exceed $4,925 per employee, earned during the 90 days before bankruptcy commences). They are neither current nor wages.

Payment of these sums therefore has been problematic from the outset of the bankruptcy. Given the parties' agreement that these benefits do not (as a matter of pre-bankruptcy contract) outlast the pension plan, it does not make sense to mandate their continuation after the plan's termination date, at 100¢ on the dollar, while other unsecured creditors get much less. United therefore is not required to make the payments for October 2005 or later months. What the retirees are entitled to is not full payment but an unsecured claim equal to the value of these benefits. (We discuss the handling of that unsecured claim in the companion opinion, No. 06-2780, slip op. 6.)

This does not mean that "United" becomes wealthier at the retirees' expense. "United" is just a collective name for all stakeholders. Old unsecured debts were converted to equity in the reorganized United, so money in the firm's bank account is value to the former unsecured creditors, who obtain a (very slightly) larger return on their loans. (As we have mentioned, both active and retired pilots are among these unsecured creditors.)

The PBGC's appeal (No. 06-2843) is dismissed for want of jurisdiction because it requests an advisory opinion. On the appeals of ALPA and the URPBPA (Nos. 06-2662 and 06-2714) the judgment terminating the pilots' pension plan as of December 30, 2004, is affirmed. On United's appeal (No. 06-1867) with respect to the October benefits order, the judgment is reversed and the case is remanded with instructions to enter a judgment allowing United to reclaim the contents of the segregated fund.

436 F.Supp.2d 909

United States District Court, N.D. Illinois,
Eastern Division.
PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,
v.
UNITED AIR LINES, INC., as Plan Administrator
for the United Airlines Pilot Defined Benefit
Pension Plan, Defendant,
and
Air Line Pilots Association, International, United
Retired Pilots Benefit Protection Association,
Roger D. Hall, Dennis D. Dillon, Gerard Terstiege,
Eugene M. Cummings, Raymond P. Fink, James M.
Krasno and William L. Rutherford, Intervenors.
No. 06 C 1222.

June 13, 2006.

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MEMORANDUM OPINION AND ORDER

LEFKOW, District Judge.

This case arises from the decision of the Pension Benefit Guarantee Corporation ("PBGC") to seek a judicial decree authorizing the involuntary termination of a pension plan sponsored by United Airlines, Inc. ("United"). The court referred this matter to the bankruptcy court, where United's Chapter 11 bankruptcy was pending in front of the Honorable Eugene R. Wedoff. Following a trial, this matter has returned to this court accompanied by the bankruptcy court's proposed findings of fact and conclusions of law. The bankruptcy court recommended finding that PBGC met its burden of establishing that termination of the United Airlines Pilot Defined Benefit Pension Plan was necessary to avoid an unreasonable increase in PBGC's liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1342(c), with an effective termination date of December 30, 2004. Also before the court are the objections of PBGC, the Airline Pilots Association ("ALPA"), International, and the United Retired Pilots Benefit Protection Association ("RPA") to the bankruptcy court's proposed findings of fact and conclusions of law. For the reasons stated below, the court accepts the recommendations of the bankruptcy court as modified.

I. BACKGROUND

Although the parties are abundantly familiar with the events leading up to the present decision, for the sake of completeness, the court will provide a brief recapitulation of the background of this case.

A. The Pilot Plan

Pursuant to a collective bargaining agreement between United and Airline Pilots Association, International, the exclusive collective bargaining representative of United's pilots, United maintained the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan") and served as the plan sponsor and administrator.

United and twenty-seven related corporations filed voluntary Chapter 11 cases in the bankruptcy court on December 9, 2002. Thereafter, United entered into negotiations with ALPA regarding the Pilot Plan. United and ALPA ultimately reached an agreement to modify the collective bargaining agreement to eliminate the pension plans created by the collective bargaining agreement. On December 17, 2004, United filed a Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA. The bankruptcy court denied this initial motion but later approved a modified version of the agreement. Both versions of the agreement provided, *inter alia,* that ALPA would not "oppose the Company's efforts to terminate the A Plan under 29 U.S.C. § 1341(c)" as long as United did not seek to terminate the Pilot Plan before May 2005. Both versions further provided that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341, and that nothing in the Letter of Agreement "shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated."

The United Retired Pilots Benefit Protection Association ("URPA"), which is an Illinois not-for-profit corporation created to protect the benefits of United's retired

pilots, had attempted to participate in the negotiations, but United did not permit URPA's participation. URPA filed a motion in the bankruptcy court which asked for the appointment of an authorized representative to represent United's retired pilots and their pension benefits. The bankruptcy court denied this motion, which both the district court, *per* Judge Darrah, and the Seventh Circuit Court of Appeals upheld on appeal.

B. PBGC

PBGC is a federal corporation established under 29 U.S.C. § 1302(a) to administer the insurance program for defined benefit pension plans created under Title IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC guarantees certain benefits under ERISA pension plans and has authority pursuant to ERISA to terminate under funded pension plans. *See* 29 U.S.C. § 1342.

In December of 2004, PBGC determined that the Pilot Plan should be terminated in order to avoid an unreasonable increase in PBGC's liability. United refused to consent to a termination of the Pilot Plan. On December 29, 2004, the Executive Director of PBGC issued a Notice of Determination, which provided

> [T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(4), that the United Airlines Pilot Defined Benefit Pension Plan ("Plan") must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. PBGC further determined, under

> ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have December 30, 2004, established as the Plan's termination date.

That same day, PBGC sent the Notice of Determination to United and ALPA via overnight mail, which ALPA received on December 30, 2004. Also on December 30, the Notice of Determination was published nationally in *USA Today* and in newspapers serving United's hubs, including *The Chicago Tribune, The Washington Post, The Los Angeles Times, The San Francisco Chronicle, The Denver Post,* and *The Rocky Mountain News.* Additionally, PBGC, United, and ALPA published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan.

On December 30, 2004, PBGC filed a complaint in this court against United as administrator of the Pilot Plan, seeking a decree of termination of the Pilot Plan pursuant to § 1342(c) of ERISA.

C. Referral of Proceedings by This Court to the Bankruptcy Court

On January 4, 2005, United filed an Emergency Motion to Confirm Automatic Referral to the United States Bankruptcy Court for the Northern District of Illinois Pursuant to Internal Operating Procedure 15(a), arguing that PBGC's complaint fell within the bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 157(a)

and requesting that the case be assigned to the bankruptcy court overseeing United's Chapter 11 proceedings. In opposing United's emergency motion, PBGC argued that the bankruptcy court did not have jurisdiction over PBGC's complaint because the structure of ERISA's pension plan termination provisions and the language of 29 U.S.C. § 1342(c) provided for exclusive jurisdiction in "the appropriate United States District Court."

On January 25, 2005, this court granted United's emergency motion and transferred the case to the bankruptcy court. The bankruptcy court subsequently granted the motions to intervene of ALPA, URPA, and certain individual retired pilots. PBGC moved this court to reconsider the referral to the bankruptcy court or, in the alternative, for a certification to file an interlocutory appeal.[1]

D. Bankruptcy Court Proceedings

On April 13, 2005, the bankruptcy court determined that it would permit discovery beyond PBGC's administrative record. PBGC moved for summary judgment on June 6, 2005, arguing that its decision to seek a termination of the Pilot Plan was entitled to judicial deference and that its decision to initiate termination had not been arbitrary or capricious. PBGC further argued that the notice provided to the plan participants was sufficient to set the termination date as of December 30, 2004. United, ALPA, and URPA opposed PBGC's motion for summary judgment.

The bankruptcy court issued a preliminary ruling on PBGC's motion for summary judgment on August 25,

[1] This motion was terminated in error on September 9, 2005.

2005. The bankruptcy court subsequently issued an Amended Memorandum of Decision on Motion for Summary Judgment on October 26, 2005, ruling that PBGC's adversary proceeding was a core proceeding. As a consequence, the bankruptcy court entered a final judgment. In this judgment, the bankruptcy court held that a trial was required as to whether PBGC established the propriety of terminating the Pilot Plan by a preponderance of the evidence; that § 1342(c) required a *de novo* determination of the appropriateness of the Pilot Plan termination, and not a deferential review under the Administrative Procedure Act; and that the constructive notice to the Pilot Plan participants was sufficient to establish a termination date of December 30, 2004.

Following a bench trial, the bankruptcy court issued a Memorandum of Decision, holding that PBGC had showed that continued operation of the Pilot Plan beyond December 30, 2004 would result in an unreasonable increase in liability of PBGC's fund, and as a result, PBGC was entitled to a decree terminating the Pilot Plan pursuant to 29 U.S.C. § 1342(c) as of December 30, 2004. On October 28, 2005, the bankruptcy court entered its order retroactively terminating the Pilot Plan to December 30, 2004.

E. Appeal from the Bankruptcy Court Proceedings Before Judge Darrah

Thereafter, on November 4, 2005, ALPA filed a notice of appeal in the district court. URPA filed its notice of appeal on November 7, 2005. PBGC filed a cross-appeal on November 16, 2005. These appeals from the bankruptcy court's final orders were assigned to Judge Darrah, Civil Case No. 05 C 6955.

PBGC raised three issues on appeal: (1) the district court erred in referring the termination proceeding to the bankruptcy court; (2) the bankruptcy court erred in finding that the termination was a core proceeding; and (3) the bankruptcy court erred by holding a *de novo* trial. PBGC, however, did not file a timely notice of appeal, and Judge Darrah dismissed PBGC's cross-appeal as untimely.

Because PBGC and URPA had challenged the bankruptcy court's jurisdiction, an issue that may be raised at any time, Judge Darrah considered their arguments that the bankruptcy court did not have jurisdiction to enter a final judgment in the termination proceeding because the termination was not a core proceeding. Judge Darrah ruled that the termination proceeding filed by PBGC pursuant to Title IV of ERISA was a non-core proceeding. Accordingly, the bankruptcy court had exceeded its limited jurisdiction by issuing a final judgment rather than submitting proposed findings of fact and conclusions of law to the district court, as required by § 157(c)(1). Judge Darrah reversed the final judgments of the bankruptcy court and remanded the case for proceedings consistent with 28 U.S.C. 157(c). Judge Darrah then dismissed the appeals of ALPA and URPA as moot.

F. Remand to the Bankruptcy Court and Subsequent Appeal of the Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law to This Court

On February 13, 2006, the bankruptcy court adopted as its recommendation to the district court the two previously issued memoranda, with the exception of those portions of the memoranda that addressed its jurisdiction, issuing its proposed findings of fact and conclusions of law

on the motion for summary judgment and the subsequent trial.

On February 24, 2006, PBGC filed its objections to the bankruptcy court's proposed findings of fact and conclusions of law to which United, ALPA, and URPA responded. ALPA and URPA also have filed objections to the bankruptcy court's proposed findings and conclusions to which PBGC responded. These objections are presently before this court.

II. STANDARD OF REVIEW

In non-core proceedings, *i.e.*, cases that are not directly related to matters arising under Title 11, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). The district court then conducts a *de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law to which a party has made a specific written objection. *Id.;* Fed. R. Bank. Proc. 9033(d). The district court may accept, reject, or modify the proposed findings of fact and conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions. Fed. R. Bank. Proc. 9033(d).

III. ANALYSIS

PBGC objects to the bankruptcy court's proposed findings of fact and conclusions of law on the ground that the bankruptcy court applied the *de novo* standard when it reviewed PBGC's decision to terminate the Pilot Plan rather than reviewing PBGC's determination on the

administrative record under the arbitrary and capricious standard. PBGC also requests that this court reconsider and reverse its decision referring the involuntary termination proceeding to the bankruptcy court. PBGC asks this court to hold that it will review PBGC's termination decision on the agency's administrative record under the arbitrary and capricious standard. Finally, PBGC seeks an order that the parties promptly submit summary judgment motions on the issue of whether PBGC's determination that the Pilot Plan should be terminated was arbitrary and capricious.

Both ALPA and URPA object to the bankruptcy court's conclusion that PBGC met its burden of proof that the Pilot Plan should be terminated, effective December 30, 2004, under § 1342(c). ALPA further argues that PBGC was required to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan. The court will address each argument in turn.

A. Referral to the Bankruptcy Court

As a preliminary matter, PBGC requests that this court reconsider its referral of PBGC's action to terminate the Pilot Plan to the bankruptcy court. A motion for reconsideration serves the limited function to correct manifest errors of law or fact or to present newly discovered evidence, and whether to grant such a motion is within the discretion of the court. *Caisse Nationale De Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269-70 (7th Cir.1996). The problems warranting such a grant are rare. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990) (citation omitted). The motion also serves a valuable function where the court

"has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Id.*

While PBGC contested the court's referral of the action to the bankruptcy court, PBGC ultimately prevailed in the bankruptcy court. The court sees no reason to reconsider the referral at this late stage in the proceedings, particularly when PBGC is only raising arguments that the court considered and rejected previously. As a consequence, PBGC's motion to reconsider is denied.

B. Appropriate Standard of Review for an Involuntary Termination Action Under 29 U.S.C. § 1342(c)

Title IV of ERISA establishes the exclusive means for terminating a defined benefit pension plan regulated by statute. 29 U.S.C. § 1341(a). In enacting section 1342(c) of ERISA, Congress authorized PBGC to institute proceedings to terminate a plan whenever PBGC determines that one of four enumerated circumstances exists.[2] 29 U.S.C.

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[2] 29 U.S.C. § 1342(a) states:

> The corporation may institute proceedings under this section to terminate a plan whenever it determines that –
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> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,
>
> (2) the plan will be unable to pay benefits when due,
>
> (3) the reportable event described in section 1343(c)(7) of this title has occurred, or

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§ 1342(a)(1)-(4). As relevant to the present matter, PBGC may institute proceedings to terminate a plan when PBGC determines that "the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). After determining that one of the enumerated circumstances exists, PBGC may enter into an agreement with the plan administrator to terminate the plan, which does not require a court adjudication. If, however, the plan administrator does not agree to a termination of the plan, after issuing notice to the plan administrator, PBGC may "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c).

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(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

The threshold issue for the court to determine is whether, under 29 U.S.C. § 1342(c), a court may issue a decree terminating a pension plan if parties opposing termination fail to establish that PBGC acted arbitrarily in seeking termination, or whether PBGC must affirmatively establish grounds for termination. The bankruptcy court concluded that § 1342(c) of ERISA requires a *de novo* determination of the appropriateness of an involuntary plan termination. PBGC challenges this conclusion, arguing that the court should review PBGC's termination decision on the administrative record under the arbitrary and capricious standard. PBGC argues that since there is nothing in the applicable ERISA provisions demonstrating that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*, does not apply to the decision of PBGC, the court should apply the default standard of the APA, 5 U.S.C. § 706(2)(A),[3] and ask whether PBGC's determination was arbitrary and capricious. For the reasons stated below, this court agrees with the bankruptcy court that § 1342(c) requires the court to determine *de novo* the appropriateness of an involuntary plan termination.

First, § 704 states, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Section 1342(c) establishes an "other adequate remedy," namely, a decree from the appropriate district court adjudicating that a plan must be terminated. By providing

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[3] The APA authorizes a court to set aside an administrative determination only on a showing that the determination is either (1) "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or (2) "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court," 5 U.S.C. § 706(2)(F).

as such, the express language of § 1342(c) removes involuntary termination actions from the purview of the APA.

Second, in issuing a decree adjudicating the appropriateness of a plan termination, the court, unlike PBGC, must consider the factors specified in § 1342(c). The statute empowers the court to determine whether a termination is required based on a need "to protect the interests of the participants, to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c). Yet, it is not necessary for PBGC to consider these factors in determining that a plan must be terminated in the first instance. *See* 29 U.S.C. § 1342(a), *supra,* note 5. While there is only a subtle difference between the factors considered by PBGC and the court, by setting forth these criteria for the court to consider, Congress implicitly rejected the arbitrary and capricious standard. Additionally, the standard of review under the arbitrary and capricious standard cannot be reconciled with the requirement that the court consider factors other than those on which PBGC relied for its determination. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 at 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), *quoting Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). In reviewing the explanation of the agency, the court must "consider

whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id., quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281 at 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 at 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). A judicial decree adjudicating that a plan must be terminated must consider more than the factors on which PBGC relied for its determination. As such, review under the arbitrary and capricious standard is inappropriate.

Third, the plain language of § 1342(c) establishes that the proceeding in the court is an adjudication and not merely an enforcement or review of PBGC's prior determination. The court agrees with PBGC that PBGC must make the determination in the first instance that a plan must be terminated; however, PBGC construes § 1342 as requiring a single determination. In fact, the statute calls for two determinations: the initial determination of PBGC that the plan must be terminated because of the existence of one of the factors specified in § 1342(a) and the subsequent determination of the court that the plan must be terminated based on the factors specified in § 1342(c). Only after PBGC makes its determination may it institute proceedings. *See* 29 U.S.C. § 1342(a) ("The corporation may institute proceedings under this section to terminate a plan whenever it determines that [one of the enumerated circumstances exists.]"). Thus, PBGC's determination cannot be described as the culmination of a plan termination.

Fourth, the judicial decree functions as a "substantial safeguard" for the rights of parties other than PBGC affected by plan termination, and deferential review of

agency decision-making in that regard is incompatible with the judicial decree requirement. In § 1342(a), Congress established that with respect to "small plans" PBGC may establish a simplified procedure for termination "as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section)." 29 U.S.C. § 1342(a). The statute requires "substantial safeguards" for plan participants, beneficiaries, and sponsors. While PBGC has no interest in unnecessarily incurring liability for an unfunded plan, but it also has statutory responsibilities to protect participants and beneficiaries, and employers who pay premiums to PBGC. PBGC's interests are not necessarily furthered by allowing a plan to continue or in seeking to maximize the benefits of plan participants and beneficiaries. Thus, the court acts as a safeguard, thereby ensuring that the termination of a particular plan is required, and deferential review of agency decision-making is inconsistent with this responsibility.

The court acknowledges that the application of the *de novo* standard to an involuntary termination proceeding is a departure from the decisions of other district courts. In fact, this court initially saw the advantage of applying the arbitrary and capricious standard of the APA to PBGC's determinations when deciding whether to issue a decree under § 1342(c). Certainly, the arbitrary and capricious standard has its appeal in terms of streamlining the analysis and relying on the expertise of the PBGC. *See In re Pan Am. World Airways, Inc. Co-op. Retirement Income Plan*, 777 F.Supp. 1179, 1181-82 (S.D.N.Y.1991) (reasoning that because there is nothing in the applicable ERISA

provisions to show that the 5 U.S.C. §§ 706(2)(A) or (F) do not apply to the decision of PBGC, the court would review PBGC's termination determination under the arbitrary and capricious standard); *PBGC v. Haberbush,* No. CV0002631GHKAIJX, 2000 WL 33362003, at *5-7 (C.D.Cal. Nov.3, 2000) (granting summary judgment in favor of PBGC and terminating pension plan after reviewing PBGC's decision under the arbitrary and capricious standard); *PBGC v. FEL Corp.,* 798 F.Supp. 239, 241-42 (D.N.J.1992) (granting PBGC's request to terminate a pension plan after reviewing PBGC's decision under the arbitrary and capricious standard). But in the end, the court is not persuaded that arbitrary and capricious review applies to review of action taken under 1342(c).

In the first case, *In re Pan Am.,* the court held that there was nothing in the applicable ERISA provisions to show that either § 706(2)(A) or § 706(2)(F) of the APA should not apply to the decision of PBGC. 777 F.Supp. at 1181. This conclusion ignored the import of the language in § 1342(c) requiring a judicial decree adjudicating that the plan must be terminated. By providing for a decree adjudicating that the plan must be terminated, Congress removed involuntary termination proceedings from the sphere of the APA and gave the court the discretion to determine that a plan must be terminated.

As the court in *PBGC v. Heppenstall Company* explained, "Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme." 633 F.2d 293 at 301 (3d Cir.1980). In *Heppenstall,* the Third Circuit rejected PBGC's argument that the court should defer to PBGC's administrative expertise in

deciding a plan's termination date because the statutory scheme relegates resolution of disputes over termination to the court in the first instance. *Id.; see* 29 U.S.C. § 1348(b)(3) (stating that "if no agreement is reached [between PBGC and the plan administrator as to the date of termination of a plan], the date [is] established by the court"). Section 1342(c) likewise requires that the court adjudicate whether a plan must be terminated, which is Congress's delegation to the court of the responsibility of determining that a plan must be terminated.

Additionally, two of the courts relied on the Supreme Court's decision in *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990), in support of their decisions to apply the arbitrary and capricious standard of review. *See FEL,* 798 F.Supp. at 241; *Haberbush,* 2000 WL 33362003, at *6. But the Supreme Court in *LTV* was reviewing PBGC's decision restoring a terminated pension plan pursuant to 29 U.S.C. § 1347, which is a statute that differs significantly from § 1342.[4] Section 1347 does not

[4] 29 U.S.C. § 1347 provides:

> Whenever the corporation determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, should not be terminated under section 1341 or 1342 of this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 or this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter,

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require a decree adjudicating that a plan must be restored or otherwise require the court to determine the appropriateness of PBGC's decision. The court recognizes that many decisions of PBGC are entitled to deferential review under the APA, as in *LTV Corp.*; however, this does not perforce mean that the court must defer to PBGC's decision to seek an involuntary termination pursuant to § 1342(c).

A. Facts Established in the Bankruptcy Court Proceedings

1. Sufficiency of Notice

In ruling on summary judgment, the bankruptcy court determined that if PBGC proved that the Pilot Plan must be terminated, it would be necessary to consider whether the notice provided by PBGC was sufficient to establish a termination date of December 30, 2004. Finding that there were no genuine issues of fact for trial, the bankruptcy court held that PBGC was entitled to an order establishing that its notice of December 30, 2004 was effective. ALPA objects to this finding, arguing that PBGC was required to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan. The bankruptcy court was correct.

As stated previously, when PBGC and the plan administrator cannot agree on the termination date of a plan,

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to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

the court must set one. 29 U.S.C. § 1348(a)(3), (4). To establish a termination date, the court considers (1) "the expectation of the plan participants," and (2) "the financial implications of the termination for PBGC." *See PBGC v. Republic Techs. Int'l, LLC,* 386 F.3d 659, 665 (6th Cir.2004) (collecting cases). This analysis requires the court to "determine the earliest date when the plan participants had actual or constructive notice of the plan's termination, *i.e.,* notice sufficient to extinguish their reliance interests." *Id.,citing In re Pension Plan for Employees of Broadway Maintenance Corp.,* 707 F.2d 647, 652-53 (2d Cir.1983). After that date is determined, the court "should then select whatever later date serves the interest of PBGC." *Id.,quoting Broadway Maintenance Corp.,* 707 F.2d at 652-53.

Courts have recognized various methods for PBGC to give actual or constructive notice to plan participants. *See Heppenstall,* 633 F.2d at 302 (acknowledging that constructive notice would suffice such as notice to the collective bargaining representative); *Republic Techs. Int'l, LLC,* 386 F.3d at 664, 668 (holding that publishing a notice in hometown newspapers and issuing a notice of termination the day before the date set as the termination date to the plan administrator and the union representative gave sufficient notice to the participants); *In re Pan Am.,* 777 F.Supp. at 1185 (holding that receipt of actual notice by plan participants satisfied PBGC's notice requirement).

PBGC sent its Notice of Determination to ALPA on December 29, 2004, and ALPA received this notice the following day, December 30, 2004. The Notice of Determination also was published nationally in newspapers throughout the country on December 30, 2004. That same day, PBGC, United, and ALPA published press releases on

their websites announcing PBGC's decision to seek termination of the Pilot Plan. These efforts by PBGC provided constructive notice to the plan participants that the plan would be terminated, effective December 30, 2004, such that the Pilot Plan's participants "no longer had a justifiable expectation in the accrual of vested pension rights." *Heppenstall,* 633 F.2d at 302.

The sufficiency of the collective, constructive notice provided by PBGC is consistent with the distinction between the notice requirements of 29 U.S.C. § 1342(c) and 29 U.S.C. § 1342(d)(2)(B). Congress mandated only that PBGC provide notice to the plan administrator before seeking a decree adjudicating that a pension plan must be terminated. *See* 29 U.S.C. § 1342(c). In contrast, if a trustee of a pension plan seeks termination of the plan, he must give notice to "each participant in the plan and each beneficiary of a deceased participant. . . ." 29 U.S.C. § 1342(d)(2)(B). While PBGC must give notice, Congress lessened the burden on PBGC as to each of the plan participants and beneficiaries. Had Congress intended that PBGC provide individualized notice to each of the participants and beneficiaries, Congress would have so provided.

ALPA argues, however, that the two-part test that the bankruptcy court applied was developed in wholly different circumstances in which a plan sponsor had ceased operations or was close to liquidation. While the economic circumstances faced by the employers and plan participants in *Heppenstall* and *Republic Technologies* were more dire than those confronted by the plan participants and beneficiaries in this case, the Notice of Termination sent by PBGC to United and ALPA, published in numerous newspapers, and discussed in the press releases of PBGC,

United, and ALPA communicated effectively to the Pilot Plan's participants and beneficiaries that PBGC was seeking to terminate the plan. The Pilot Plan's participants and beneficiaries had the ability to acquire the knowledge that PBGC was seeking to terminate the Pilot Plan by reasonably diligent inquiry. *See Eckstein v. Balcor Film Investors,* 58 F.3d 1162, 1168 (7th Cir.1995) (noting that "constructive notice" means "no actual knowledge but the ability to acquire knowledge by reasonably diligent inquiry"). Moreover, ALPA's construction of the notice requirement is contrary to the language of §§ 1342(a)(4) and 1342(c), which allow PBGC to seek an involuntary termination, after giving notice to the plan administrator, based on the increase in PBGC's liability and not the condition of the employer.

ALPA argues further that its communications that it intended to challenge termination of the Pilot Plan and other developments, including a ratification vote on a modified agreement, raised such a strong expectation of plan continuation that PBGC's notice was ineffective. This argument was considered and rejected by the Sixth Circuit in *Republic Technologies*, which explained that "[e]very court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated." 386 F.3d at 667. The court sees no reason to depart from this standard in this case. The issue of notice does not focus on whether the plan participants agree with PBGC's decision to seek a termination or whether to contest the termination; it focuses on whether the plan participants had the knowledge or the ability to acquire the knowledge that PBGC was seeking to terminate the plan that was sufficient to

extinguish their reliance interests. To find to the contrary would require courts to establish a sliding scale approach on the issue of notice, rendering the efficacy of PBGC's notice contingent upon how vigorously parties contest the involuntary termination proceeding, the financial conditions of the employer, and whether each participant had knowledge of both the notice of termination and the efforts to contest the termination. Such an approach would necessarily delay the date of termination, thereby increasing PBGC's liability contrary to the purpose of § 1342(c).

Having determined that the constructive notice provided to the Pilot Plan's participants and beneficiaries was effective as of December 30, 2004, the court considers whatever later date serves the interest of PBGC. *See PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir.1993) ("PBGC's interests should be deemed to be best served by the date proposed by PBGC."). Here, December 30, 2004 is the date the best serves PBGC's interests, as any later date would result in PBGC's incurring an increase in its liability.

2. Increase in PBGC's Liability

ALPA and URPA challenge the bankruptcy court's conclusion that PBGC met its burden under § 1342(c) to prove that the Pilot Plan should be terminated, effective December 30, 2004. Almost all of the evidence at trial focused on the extent of the loss that PBGC's fund would assume if the termination of the Pilot Plan did not occur until after December 30, 2004. Four actuarial witnesses testified. Documentary evidence consisted of excerpts from PBGC's administrative record and other internal documents, the agreements between United and ALPA modifying their

collective bargaining agreements, and reports and other materials prepared by the parties' expert witnesses. The testimony of PBGC's witnesses evidenced that the total increase in PBGC's liability for the Pilot Plan from December 2004 through June 2005 would be $101 million: $44 million in increased liability if the plan terminated in January 2005 rather than December 2004 plus an additional $9.5 million per month in increased liability through June 2005. The testimony of ALPA's witness evidenced that the increase would be $79 million: $39 million in increased liability if the plan terminated after December 30, 2004 plus an additional monthly increase of $6.7 million.

The weight of the evidence at trial supported PBGC's calculation of the initial increased liability of PBGC, $44 million. In this calculation, PBGC documented an increase in maximum benefits guaranteed by PBGC that would result in increased liability for PBGC because many participants in the Pilot Plan were entitled to plan benefits that exceeded the amount guaranteed by PBGC. ALPA's expert did not explain his reason for his lower estimate. The weight of the evidence at trial supported ALPA's calculations as to the monthly increases in PBGC's liability through June 2005, $6.7 million, as the methodology of ALPA's expert reduced these monthly liability increases to present value, and PBGC had failed to document its correction of an initial, acknowledged error in calculating the effect of a non-terminated plan paying benefits in excess of guaranteed amounts. Thus, the evidence established that PBGC's total increase in liability through June 2005 would be $84.2 million.

3. The Pilot Plan Would Terminate

ALPA and URPA object to the bankruptcy court's finding that PBGC proved by a preponderance of the evidence that the Pilot Plan was likely to terminate. Although PBGC did not have a witness to testify as to whether the Pilot Plan would terminate or the financial condition of United, the bankruptcy court took judicial notice of matters of public record, which, taken together, support the reasonable inference that the Pilot Plan would terminate. The bankruptcy court considered, *inter alia,* that United had been in bankruptcy since December of 2002; United had announced that it needed to terminate all of its pension plans in order to successfully emerge from bankruptcy; United had initiated a 1113 proceeding to remove from its collective bargaining agreements provisions requiring contributions to the pension plans; and United's business plan in August of 2004 did not provide for any pension contributions.

ALPA and URPA argue, however, that the bankruptcy court relied on documents that it had previously held inadmissible and hearsay statements that PBGC never attempted to introduce into evidence. ALPA and URPA argue further that had the bankruptcy court made proper findings of fact, it would have been obliged to take into account the fact that the only evidence introduced at trial regarding the likelihood of plan termination was the Kramer Report, which ALPA and URPA assert demonstrated that the Pilot Plan did not need to be terminated. It was proper, however, for the bankruptcy court to take judicial notice of matters of public record. *See Menominee Indian Tribe of Wisconsin v. Thompson,* 161 F.3d 449, 456 (7th Cir.1998) (stating that "[j]udicial notice of historical documents, documents contained in the public record, and

reports of administrative bodies is proper"). And the Kramer Report offered the opinion that not all four of United's pension plans needed to be terminated, but it did not establish that United would choose to save the Pilot Plan if it had to choose between the plans.

ALPA and URPA also argue that the bankruptcy court should not have relied on United's agreement with ALPA to support the termination or United's statements that it would have to terminate its pension plans in order to emerge from bankruptcy. As recognized by the bankruptcy court, however, the ALPA agreement demonstrated United's position that the plan needed to be terminated in order for United to emerge from bankruptcy. United's statements that it would have to terminate its pension plans in order to emerge from bankruptcy, while not admissible for their truth, are admissible as evidence of United's bankruptcy plan and its intent. United intended to terminate its pension plan in order to emerge from bankruptcy. United's intent, coupled with numerous matters of public record, allowed the bankruptcy court to draw the reasonable inference that the Pilot Plan would terminate. Importantly, when asked by the bankruptcy judge, neither ALPA nor URPA offered any evidence contradicting the inference that the Pilot Plan would terminate[5] Thus, although the evidence that the Pilot Plan would terminate was somewhat sparse, it was credible and uncontradicted. As such, the bankruptcy court correctly

[5] URPA offered the testimony of an actuarial witness as to a "split-freeze plan" as evidence that the termination of the Pilot Plan was not necessary. The witness acknowledged, however, that United was unwilling to pursue this plan. As a result, while this alternative plan was theoretically possible, it was not likely to transpire.

determined based on a preponderance of the evidence that the that the [sic] Pilot Plan would terminate.

3. [sic] Unreasonable Increase in PBGC Liability

Having determined that the Pilot Plan would terminate, the bankruptcy court considered whether the increase in liability of PBGC, whether $79 million or $101 million or some amount in between, would be "unreasonable," as required for termination under § 1342(c). Section 1342(c) specifies that the court will issue a decree adjudicating that a plan must be terminated to avoid any unreasonable increase in the liability of the fund. 29 U.S.C. § 1342(c). The statute, however, does not define "unreasonable." There is also little guidance in the way of case law or legislative history. *See In re Pan Am.*, 777 F.Supp. at 1182 (discussing former version of § 1342(c) which utilized "further increase" rather than "unreasonable increase" language). Lacking guidance by the statute, the bankruptcy court fashioned a standard that requires both a monetarily significant increase in PBGC's liability and a plan likely to terminate in an underfunded condition, such that the increase in liability would be reflected in an actual additional loss for PBGC's insurance fund. ALPA and URPA object to the bankruptcy court's "unreasonable increase" standard, arguing that an "unreasonable increase" must be determined based on something more than increases that resulted from the ordinary operation of a plan and that considered the overall amount of the increase in the context of the plan's total assets. The court sustains in part and overrules ALPA and URPA's objections.

First, the statute specifies "*any* unreasonable increase." This word choice demonstrates that the focus of the court's consideration is to be the increase itself and whether that amount is unreasonable rather than on ALPA's view that the cause of the increase matters. Accordingly, that the initial increase in PBGC's liability in this case would result from a statutory annual adjustment has no bearing on whether that increase in PBGC's liability is unreasonable.

Second, when considered in the context of the statute, an "unreasonable increase" in PBGC's liability constitutes a monetarily significant amount. Title IV endows PBGC with the responsibility of furthering the statutory purposes of Title IV identified by Congress. *LTV Corp.*, 496 U.S. at 649, 110 S.Ct. 2668. These purposes are

> "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
>
> (3) to maintain premiums established by [PBGC] under section 1306 of this title at the lowest level consistent with carrying out the obligations under this subchapter."

Id., quoting 29 U.S.C. § 1302(a). These purposes do not always coexist peaceably. At times, such as in the present matter, PBGC must forego encouraging the continuation and maintenance of a particular plan in order to ensure that an increase in PBGC's liability does not affect negatively the payment of benefits to all participants and

beneficiaries or the premiums established by PBGC. Additionally, PBGC must confront a $23 billion deficit[6] and, therefore, must be vigilant in limiting its losses while continuing to protect its statutorily-defined responsibilities. *See In re UAL Corp.,* 428 F.3d 677 at 681 (7th Cir.2005) (stating that "[t]hrough 29 U.S.C. § 1342, Congress authorized PBGC to terminate a failing plan so that PBGC could nip a plan's increasing losses and thereby reduce PBGC's exposure to mounting liabilities."). A monetarily significant amount is the best gauge as to the effect PBGC's increased liability would have on its statutory responsibilities.[7]

Third, the court is guided by the reasoning of the court in *Heppenstall* in the balancing of competing interests involved in an involuntary termination. In *Heppenstall,* the court was tasked with determining the termination date of a plan pursuant to § 1348(b)(2), and to resolve this issue, the court weighed the competing interests involved, the same interests at issue here: PBGC's interest as an insurer in promptly terminating an underfunded plan in

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[6] The PBGC's deficit is a matter of public record. *See* PBGC's 2005 Performance Accountability Report at p. 4, http://www.pbgc.gov/workersretirees/about-pbgc/content/page13176.html. The court make [sic] take judicial notice of matters of public record. *See Menominee Indian Tribe of Wisconsin,* 161 F.3d at 456.

[7] The court in the *Pan Am* case similarly stated, "A substantial increase in . . . [PBGC's] potential liability, with no certain prospect that such potential liability can be recouped, should be regarded under this statute as unreasonable because the PBGC fund must be available to protect the minimally guaranteed benefits of all covered plans in the United States, not just the benefits of Pan Am employees." *In re Pan Am.,* 777 F.Supp. at 1183. That court, however, relied on the arbitrary and capricious standard in finding that an additional liability of $700,000 per month was unreasonable. As such, it does not provide much assistance to the court under the *de novo* standard.

order to avoid additional losses to its insurance fund and the plan participants' interest in receiving expected benefits. 633 F.2d at 301-02.

Here, PBGC's interest is furthered when a plan is terminated because its continued operation would result in a depletion of PBGC's insurance fund, while the participants' interest is furthered by not terminating a plan that would not result in such a depletion. In this regard, the court departs from the bankruptcy court's construction of the appropriate standard. This court's construction of § 1342(c) is consistent with its express language, which provides that the court will issue a decree adjudicating that a "plan *must* be terminated to avoid . . . *any unreasonable increase* in the liability of the fund." It is not the potential increase in the liability of PBGC that Congress sought to avoid by granting PBGC the authority to initiate involuntary termination proceedings. Rather, it is any actual, unreasonable increase in the liability of the fund, and this is best measured by a monetarily significant amount. Thus, the court sustains the objection of URPA that the bankruptcy court impermissibly lowered the standard for determining whether a plan must be terminated by ruling that PBGC was required to show that the Pilot Plan was *likely* to terminate in an underfunded condition. Because the evidence presented to the bankruptcy court established that the Pilot Plan would terminate, this alteration of the standard does not affect the outcome of this involuntary termination proceeding.

The ultimate question is whether $84.2 million is monetarily significant. There is no bright line standard to apply, as "significant" is, of course, a relative term. It requires a context. Considered in absolute terms, $84.2 million is a large amount of money. Yet, if $84.2 million is

considered in the context of PBGC's overall liability for the Pilot Plan, $84.2 million is not particularly significant, as the record shows that the potential increase in PBGC's liability is less than three percent of the Pilot Plan's total assets. At the same time, liability increases of much smaller amounts have been seen as grounds for termination. *See Heppenstall,* 633 F.2d at 300 (noting termination based on an increase in liability of $3-4 million). In the context of PBGC's deficit of $23 billion, an additional $84.2 million is a significant burden and a significant additional loss for PBGC's insurance fund, particularly since PBGC can avoid that additional liability with a December 30, 2004 termination date. In that regard, the significance of the $84.2 million is measured in the context of PBGC's economic position, the dollar amount of PBGC's increased liability, and the ability of PBGC to avoid that liability. Evaluating the significance of the $84.2 million in this context best accommodates PBGC's competing responsibilities to its fund, its beneficiaries, and employers who pay premiums, as it is PBGC's liability that is the focus of the inquiry and not a particular plan. In this context, the $84.2 million is monetarily significant.

As set forth above, PBGC satisfied its burden at trial of establishing by a preponderance of the evidence that the Pilot Plan must be terminated. First, the evidence showed that the increase in PBGC's liability was a monetarily significant amount, as PBGC's total increase in liability through June 2005 would be $84.2 million. Second, the uncontroverted evidence at trial demonstrated that the Pilot Plan would not continue. As a consequence, the termination of the Pilot Plan is necessary to avoid an unreasonable increase in PBGC's liability. Thus, the court

will issue a decree of termination and the termination date of the plans will be December 30, 2004.

ORDER

For the reasons stated above, the court accepts the bankruptcy court's proposed findings of fact and conclusions of law as modified. The court concludes that the termination of the Pilot Plan is necessary to avoid an unreasonable increase in PBGC's liability. A decree of termination will issue and the termination date is fixed at December 30, 2004.

333 B.R. 802

United States Bankruptcy Court, N.D. Illinois, Eastern Division.
In re UAL CORPORATION, et al., Debtors. Pension Benefit Guaranty Corporation, Plaintiff,
v.
United Air Lines, Inc., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan, Defendant, and Air Line Pilots Association, International, United Retired Pilots Benefit Protection Association, Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno and William L. Rutherford, Intervenors.
Bankruptcy No. 02 B 48191.
Adversary No. 05 A 00481.

Oct. 26, 2005.

Jeffrey B. Cohen, John A. Menke, Shannon L. Novey, Nancy Heermans, Office of the General Counsel, Washington, D.C.; Christopher T. Sheean, Kelley Drye & Warren LLP, Chicago, IL, for Pension Benefit Guaranty Corp.

James H.M. Sprayregen, Marc Kieselstein, David R. Seligman, Jeffrey W. Gettleman, Kirkland & Ellis LLP, Chicago, IL, for United Air Lines, Inc.

Jack J. Carriglio, Eric E. Newman, James G. Argionis, Meckler Bulger & Tilson, Chicago, IL; Frank Cummings, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Washington, D.C., for United Retired Pilots Benefit Protection Association.

Fruman Jacobson, Patrick C. Maxcy, Sonnenschein, Nath & Rosenthal, Chicago, IL; Carole Neville, Mark A. Fink, Sonnenschein, Nath & Rosenthal, New York, NY, for Committee.

Babette A. Ceccotti, Thomas N. Ciantra, Zachary N. LeedsCohen, Weiss and Simon, LLP; Stanley Eisenstein, Katz, Friedman, Eagle, Eisenstein & Johnson, P.C., Chicago, IL, for Air Line Pilots Association.

David Heller, Timothy Barnes, Latham & Watkins, Chicago, IL, for DIP lender (BancOne).

Richard S. Toder, Jay Teitelbaum, Morgan, Lewis & Bockius, LLP, New York, NY; Michael B. Solow, Kaye, Scholer, LLP, Chicago, IL, for DIP lender (Citibank and JP Morgan).

Robert J. Mrofka, Schulte, Roth & Zabel, New York, NY, for DIP lender (CIT Group).

Richard P. Krasnow, Scott E. Cohen, Weil, Gotshal & Manges, LLP, New York, NY, for DIP lender (General Electric Capital Corporation).

AMENDED MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

EUGENE R. WEDOFF, Bankruptcy Judge.

This adversary proceeding, arising in the administratively consolidated Chapter 11 cases of United Air Lines, Inc. ("United") and its related entities, is before the court for ruling on the motion of the Pension Benefit Guaranty Corporation ("PBGC") for summary judgment. The motion seeks an order (1) terminating the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan") and appointing PBGC as trustee of its assets; (2) establishing December 30, 2004, as the termination date of the Pilot Plan under 29 U.S.C. § 1348(a)(4); and (3) requiring United and all other persons who have possession, custody

or control of all records, assets and property of the Pilot Plan to deliver them to PBGC. The third request is not in dispute: the parties acknowledge that if the Pilot Plan is terminated, the records, assets and property of the Pilot Plan must be turned over to PBGC as trustee. There is a dispute, however, regarding plan termination and the termination date.

As discussed below, PBGC is not entitled to summary judgment because there is a dispute with respect to plan termination. In the absence of an agreement with the plan administrator, PBGC must prove at trial, by a preponderance of the evidence, that the Pilot Plan must be terminated "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of the fund." 11 U.S.C. § 1342(c). However, if PBGC satisfies this burden of proof and the Pilot Plan is terminated, the December 30 termination date suggested by PBGC will be effective, because the undisputed facts demonstrate that participants of the Pilot Plan received adequate notice of termination on that date and that date serves the interests of PBGC.

Jurisdiction

Federal district courts have exclusive jurisdiction over bankruptcy cases. 28 U.S.C. § 1334(a). Pursuant to 28 U.S.C. § 157(a), district courts may refer bankruptcy cases to the bankruptcy judges for their district, and by Internal Operating Procedure 15(a) the District Court for the Northern District of Illinois has made such a reference of the pending cases. When presiding over a referred case, the bankruptcy court has jurisdiction under 28 U.S.C.

§ 157(b)(1) to enter appropriate orders and judgments in core proceedings within the case. PBGC's adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning estate administration). This court may therefore enter a final judgment. *In re Smith,* 848 F.2d 813, 816 (7th Cir.1988).

Factual Background

The background facts relevant to the pending motion are not in dispute.[1]

On December 9, 2002, United and twenty-seven related corporations filed the voluntary Chapter 11 cases now before the court. (JPS at 22.) United is the plan administrator and contributing sponsor of the Pilot Plan under ERISA. (*Id.* at 21.) Approximately 15,000 active, retired and terminated United employees are participants

[1] Citations are to the Joint Pretrial Statement filed on March 16, 2005 [Docket No. 30] ("JPS"); PBGC's Motion for Summary Judgment and attachments filed on June 6, 2005 [Docket No. 54], including the Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary Judgment ("PBGC's Statement of Undisputed Material Facts") and the Declaration of Andrea Wong and attached exhibits ("Wong Decl."); United's Response to PBGC's Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary Judgment and Statement of Additional Facts filed on July 15, 2005 [Docket No. 74] ("United's Response to PBGC's Undisputed Facts"); Response of ALPA to PBGC's Statement of Undisputed Material Facts filed on July 22, 2005 [Docket No. 91] ("ALPA's Response to PBGC's Undisputed Facts"); United Retired Pilots Benefit Protection Association and Certain Individual Retired Pilots' Response to Statement of Undisputed Material Facts in Support of PBGC's Motion for Summary Judgment filed on July 15, 2005 [Docket No. 83] ("Retired Pilots' Response to PBGC's Undisputed Facts"); and PBGC's eight volume administrative record filed on March 28, 2005 – volumes 1-3 [Docket No. 47] ("AR") and volumes 4-8 filed under seal [Docket No. 34] ("AR-S").

in the Pilot Plan. (*Id.* at 22.) Before the end of 2004, United stated repeatedly, in court filings and in communications to the press and its employees, that it would likely need to terminate and replace all of its defined benefit pension plans in order to emerge successfully from bankruptcy. (*See id.* at 22.)

The Air Line Pilots Association, International ("ALPA") is the exclusive collective bargaining representative of United's pilots. ALPA entered into collective bargaining agreements with United that establish the terms and conditions of employment for United's pilots, including pension benefits provided under the Pilot Plan. (JPS at 21-22.) The United Retired Pilots Benefit Protection Association ("Retired Pilots") is an Illinois not-for-profit corporation created to protect the benefits of United's retired pilots. (*Id.* at 22.)

PBGC is a United States government corporation established under 29 U.S.C. § 1302(a) to administer the insurance program for defined benefit pension plans created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461. (JPS at 21.) PBGC guarantees certain benefits under pension plans covered by ERISA and has authority, under circumstances defined by ERISA, to terminate underfunded pension plans. (*Id.* at 23-24; *see* 29 U.S.C. § 1342.) PBGC has established an administrative process, involving its Trustee Working Group ("TWG"), to determine whether and when a pension plan should be terminated.

(*See* Wong Decl., Ex. 1 (PBGC Directive issued on May 8, 2001).)[2]

On December 17, 2004, United filed a motion seeking approval of a tentative agreement with ALPA providing for substantial modifications to their collective bargaining agreement. In the agreement, ALPA promised not to oppose termination of the Pilot Plan by United, and United promised not to seek plan termination, and to oppose any attempt by PBGC to terminate the plan, before May 2005.[3]

On December 23, 2004, PBGC staff forwarded a memorandum to the chairman of the TWG recommending termination of the Pilot Plan with a termination date as soon as practicable but in no event later than December

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[2] TWG is an interdisciplinary body, comprised of representatives from PBGC's financial, actuarial, policy and legal offices, that makes recommendations for plan termination based on staff reports. (Wong Decl., Ex. 1 at § 3.) In cases involving claims of $100 million or more, the Executive Director of PBGC determines whether to proceed with a termination recommended by TWC [sic]. (*Id.* at § 2b(4), 3.) The Executive Director also determines the termination date that should be proposed to the plan administrator. (*Id.*)

[3] See United's Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA filed on December 17, 2004 [Docket No. 9365]. United's motion to approve the December Letter of Agreement was denied, but a revised agreement was approved on January 31, 2005. See Order Denying Motion to Approve entered on January 7, 2005 [Docket No. 9697]; United's Motion to Approve Agreements Modifying Collective Bargaining Agreements filed on January 19, 2005 [Docket No. 9772]; Order Granting Motion to Approve entered on January 31, 2005 [Docket No. 9933]. The revised agreement continued to provide for ALPA's waiver of opposition to termination after May 11, 2005. In the revised agreement, United promised not to seek plan termination and to oppose PBGC-initiated termination at any time before the earlier of ten days before exiting bankruptcy or termination of United's other defined benefit pension plans.

30, 2004. (PBGC's Statement of Undisputed Material Facts at ¶ 15; AR at 14-23.) On December 27, 2004, the TWG met and voted to concur with this recommendation. (*Id.* at ¶ 16; AR at 11-13.) On December 27, 2004, TWG's recommendation, with supporting materials, was transmitted to PBGC's Executive Director. (*Id.* at ¶ 17; AR at 7.) On December 29, 2004, the Executive Director issued a Notice of Determination, which provided as follows:

> [T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(4), that the United Airlines Pilot Defined Benefit Pension Plan ("Plan") must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. PBGC further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have December 30, 2004, established as the Plan's termination date.

(*Id.* at ¶ 33; AR at 1.)[4]

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[4] PBGC has determined that if the Pilot Plan continued until June 2005, it would have to absorb as much as $138 million of additional liability. (PBGC's Statement of Undisputed Material Facts at ¶ 20.) United, ALPA and the Retired Pilots dispute PBGC's determination regarding its possible long-run loss in relation to the Pilot Plan. (United's Response to PBGC's Undisputed Facts at ¶ 20; ALPA's

(Continued on following page)

On December 29, 2004, PBGC sent to United and ALPA via overnight mail a copy of the Notice of Determination, which ALPA received on December 30, 2004. (PBGC's Statement of Undisputed Material Facts at ¶ 34-37; Wong Decl., Ex. 2.)[5] On December 30, 2004, the Notice of Determination was published nationally in *USA Today* and a variety of major newspapers serving metropolitan areas where United's hubs are located, including *The Chicago Tribune, The Washington Post, The Los Angeles Times, The San Francisco Chronicle, The Denver Post,* and *The Rocky Mountain News.* (PBGC's Statement of Undisputed Material Facts at ¶ 38; Wong Decl., Ex. 3.) In addition, on December 30, 2004, PBGC, United and ALPA all published press releases on their websites announcing PBGC's decision to seek termination of the Pilot Plan. (PBGC's Statement of Undisputed Material Facts at ¶ 38; Wong Decl., Exs. 4, 5, 6.)[6]

Response to PBGC's Undisputed Facts at ¶ 20; Retired Pilots' Response to PBGC's Undisputed Facts at ¶ 20.)

[5] United has objected to the facts asserted by PBGC regarding notice, but only on the ground that these facts are not included in the administrative record. (United's Response to PBGC's Undisputed Facts at ¶¶ 34-37.) Because, as discussed below, PBGC is required to prove its case – and not merely to defend against claims that its decision-making was arbitrary – PBGC is not limited to facts set out in its administrative record. ALPA and the Retired Pilots admit these facts, but object on the ground that PBGC's arguments regarding notice exceed the "limited scope of the summary judgment motion this Court permitted PBGC to file before the close of discovery." (ALPA's Response to PBGC's Undisputed Facts at ¶¶ 34-37; Retired Pilots' Response to PBGC's Undisputed Facts at ¶¶ 34-37.) Both objections are addressed in the Conclusions of Law. *See infra,* n. 7.

[6] ALPA indicates that it "lacks knowledge sufficient to either admit or deny the allegations of paragraph 38." (ALPA's Response to PBGC's Undisputed Facts at ¶ 38.) Because ALPA's response does not controvert the facts set forth in paragraph 38, the facts are deemed admitted

(Continued on following page)

On December 30, 2004, PBGC filed a complaint in the United States District Court for the Northern District of Illinois seeking termination of the Pilot Plan. (*See* Complaint (Case No. 04-cv-0838 [Docket No. 1]) at ¶ 1.) The district court granted motions by ALPA and the Retired Pilots to intervene under Fed.R.Civ.P 24 and also granted United's emergency motion to confirm automatic referral to the bankruptcy court pursuant to Internal Operating Procedure 15(a). (Case No. 04-cv-08338 [Docket Nos. 9, 12, 22, 23].) The case was transferred to this court on February 1, 2005, creating the pending adversary. (*Id.* [Docket No. 27].) On March 28, 2005, PBGC filed the administrative record supporting its decision to seek involuntary termination of the Pilot Plan. (AR; AR-S.)

On May 11, 2005, this court approved a settlement between United and PBGC that provided for an agreed termination of the Pilot Plan "with a termination date that is either mutually agreed by [United and PBGC] or judicially determined," but nothing in the settlement limited PBGC's right to seek its proposed plan termination date of December 30, 2004, nor did the settlement require United to act in a manner inconsistent with the revised agreement with ALPA, under which it was obligated to oppose a termination date before that of United's other defined

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pursuant to Local Rule 7056-2B. The Retired Pilots deny paragraph 38 as not being supported by reference to the record because Exhibit 4 to the Wong declaration does not contain the mentioned publications and Exhibit 5 does not contain a PBGC press release. (Retired Pilots' Response to PBGC's Undisputed Facts at ¶ 38.) However, Exhibits 3 and 4 to the Wong declaration do contain the newspaper publications as well as PBGC's press release, and the apparent error in PBGC's Statement of Undisputed Material Facts does not undermine the facts asserted.

benefit pension plans. (Order Granting United's Motion to Approve Agreement with PBGC entered on May 11, 2005 [Docket No. 11229], Ex. A, ¶ 4.)

Conclusions of Law

A. *Summary Judgment Standards*

A motion for summary judgment may be granted if the movant demonstrates through admissible evidence that no genuine issue of material fact exists for trial and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c), incorporated by reference in Fed. R. Bankr.Proc. 7056(c).[7] The initial – and dispositive – issue raised by the present summary judgment motion is whether under 29 U.S.C. § 1342(c) a court may issue a decree terminating a pension plan if parties opposing termination fail to establish that PBGC acted arbitrarily in seeking termination, or whether PBGC must affirmatively establish grounds for termination. If PBGC must prove its case, summary judgment could not be granted, because the grounds for plan termination here are in dispute.

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[7] The Retired Pilots argue that insofar as PBGC's motion seeks to establish a termination date it requests relief beyond the scope of the motion that the court directed PBGC to submit. ALPA poses a similar objection. (*See* ALPA's Response to PBGC's Undisputed Facts at 2.) Under Fed.R.Civ.P. 56, "[a] party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor *upon all or any part thereof.*" *Id.* (emphasis supplied). PBGC's motion for summary judgment is appropriate because it seeks relief contained in its Complaint. (*See* Complaint at ¶ 1.)

As discussed below, summary judgement must be denied because § 1342(c) requires a judicial determination that the Pilot Plan must be terminated – a question on which PBGC bears the burden of proof – not simply judicial review of the reasonableness of PBGC's decision to seek termination. On the other hand, there is no factual dispute regarding notice to plan participants. PBGC gave effective notice of plan termination on December 30, 2004, and is entitled to an order making that finding. If, at trial, PBGC establishes grounds for termination as of December 30, 2004, the plan will be terminated as of that date.

B. The Standard of Review under 29 U.S.C. § 1342(c)

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan regulated by the statute. 29 U.S.C. § 1341(a)(1). Section 1342(a) gives PBGC the authority to institute proceedings to terminate a plan if PBGC determines that any of four listed grounds exist. 29 U.S.C. § 1342(a)(1)-(4). One of the grounds in § 1342(a) – the one on which PBGC relies here – is that "the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4).

Under § 1342(c), if PBGC and the plan administrator agree that a plan should be terminated and a trustee appointed, then termination may occur without court adjudication.[8] When there is such an agreement, termination occurs

[8] Section 1342(c) provides in pertinent part as follows:

> If the corporation [PBGC] is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the

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by way of PBGC's informal agency action, which, if challenged, is subject to judicial review under the arbitrary

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> plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund . . . Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section . . .

29 U.S.C. § 1342(c); *see Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 199 (2d Cir.1987) ("On its face [the fourth sentence of subsection 1342(c)] permits PBGC and the administrator . . . to proceed in a summary fashion without affording plan members pretermination notice and hearings to contest the propriety of the termination decision.") Additionally, § 1342(b)(3) authorizes PBGC and the plan administrator to agree upon appointment of PBGC as trustee without instituting a court proceeding. ("[PBGC] and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).") Otherwise, PBGC may apply to the court for the appointment of a trustee pending a decree terminating the plan pursuant to § 1342(c). 29 U.S.C. § 1342(b)(1).

and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.[9]

However, and of critical importance here, if the plan administrator does not to agree to termination of the plan, PBGC must, as it did in this case, "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c). In this context, § 1342(c) requires a *de novo* determination of the appropriateness of plan termination, not mere deferential review under the APA of PBGC's determination to proceed.

First, § 1342(a) provides that with respect to "small plans" PBGC may prescribe a simplified procedure for termination "as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section)." 29 U.S.C. § 1342(a). Thus, the statute itself requires that the court decree serve as a "substantial safeguard" for the rights of parties other than PBGC affected by plan termination;

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[9] "Informal" action is a residual category including all agency actions that are not rulemaking and that need not be conducted through "on the record" hearings. *See City of West Chicago v. NRC*, 701 F.2d 632, 644 (7th Cir.1983). Section 706 of the APA instructs the court to set aside "agency action" in all cases if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or if the action fails to meet statutory, procedural or constitutional requirements. 5 U.S.C. § 706. When termination occurs through informal action, the court accordingly reviews PBGC's decision under the arbitrary and capricious standard. *See PBGC. v. LTV*, 496 U.S. 633, 655, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (reviewing PBGC's informal action restoring a terminated pension plan pursuant to 29 U.S.C. § 1347).

deferential review of agency decision-making is inconsistent with this requirement.

Second, the grounds for termination required to support a judicial decree under § 1342(c) are significantly different from those that PBGC must find to initiate termination proceedings under § 1342(a).[10] PBGC may decide to initiate termination proceedings under § 1342(a) without addressing the grounds needed for a judicial decree effecting a termination under § 1342(c). For example, under § 1342(a)(1), PBGC may initiate termination proceedings simply because a plan is underfunded, but if the underfunding is only temporary, it would not necessarily establish any of the grounds for termination under § 1342(c).[11] Thus, a judicial decree under § 1342(c) must be

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[10] Section 1342(a) provides in pertinent part that PBGC may institute proceedings to terminate a plan whenever it determines that:

> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,
>
> (2) the plan will be unable to pay benefits when due,
>
> (3) the reportable event described in section 1343(c)(7) of this title has occurred, or
>
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a). Section 1342(c), by contrast, requires a judicial decree of termination to be based on a need "[1] to protect the interests of the participants, [2] to avoid any unreasonable deterioration of the financial condition of the plan or [3] to avoid any unreasonable increase in the liability of the fund."

[11] The statutory structure appears to address precisely this situation. If the plan administrator believes that an underfunded plan cannot survive, and so accepts a PBGC determination under § 1342(a)

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based on more than a determination that PBGC did not act arbitrarily in initiating the proceeding.

Finally, § 1342(c) states that the court decree itself is to "adjudicate" whether termination is necessary under one of the specified grounds, not merely to review a determination previously made by PBGC. *See Black's Law Dictionary* (8th ed. West 2004) ("adjudicate" means "to rule upon judicially").

The legislative history of ERISA confirms that *de novo* judicial determination was an intentional feature of the law. Under the original version of the House bill, unless the plan administrator requested termination, the Secretary of Labor was authorized to terminate a plan only after an administrative hearing establishing grounds for termination. See H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5151. The bill was ultimately referred to a conference committee that removed the requirement for an administrative hearing but introduced the current requirement for court adjudication. *Id.* at 5152. Thus, a formal hearing on plan termination was always required if the administrator did not consent; the court was simply given the role of adjudicator originally assigned to the agency.

PBGC's argument for deferential judicial review here resembles the argument it made in *PBGC v. Heppenstall Co.*, 633 F.2d 293 (3d Cir.1980). In *Heppenstall,* PBGC

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that the plan should be terminated, termination becomes effective without judicial involvement. But if the administrator believes that an underfunded plan is still viable and declines to accept PBGC's decision to terminate, the employer is entitled to a judicial proceeding at which PBGC must establish the necessity for termination under § 1342(c).

insisted that the court should defer to PBGC in determining a plan's termination date under § 1348.[12] The court rejected that deferential approach on the ground that "the statutory scheme relegates resolution of disputes over termination to the courts in the first instance, not to PBGC." *Id.* at 301. Concerned about PBGC's obvious interest in protecting the solvency of the pension insurance program, the court said: "Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme." *Id.* The analysis in *Heppenstall* is fully applicable here.

PBGC's cites three decision to support deferential review of its termination decision, but none is persuasive.

The first, *In re Pan American World Airways, Inc. Cooperative Ret. Inc. Plan,* 777 F.Supp. 1179, 1181 (S.D.N.Y.1991), held that *de novo* judicial determination was unwarranted because "[t]here is nothing in the applicable ERISA provisions to show that the [judicial review provisions] of the Administrative Procedures Act . . . should not apply to this decision by PBGC." 777 F.Supp. at 1181. The court reasoned that "[t]o find a contrary intent in the statute would be to depart from the usually applicable deference to the expertise of an administrative agency, particularly when the agency has made an adjudicative

[12] Section 1384 provides that in the absence of an agreement between the plan administrator and PBGC, the termination date of a plan is "the date established by the court." 29 U.S.C. § 1384(a)(4). At the time the *Heppenstall* opinion was issued, this language was found at § 1384(2).

decision within its sphere of responsibility." *Id.* at 1181-82.[13] As discussed above, however, § 1342(c) removes contested plan termination from PBGC's sphere of responsibility. In the absence of consent from the plan administrator, PBGC is required to obtain a judicial decree; it cannot engage in informal agency action subject merely to deferential judicial review.

In *PBGC v. FEL Corp.*, 798 F.Supp. 239, 241 (D.N.J.1992), the court applied the APA's arbitrary and capricious standard rather than holding a *de novo* hearing, based principally on the Supreme Court's decision in *LTV*, 496 U.S. 633, 110 S.Ct. 2668. But *LTV* involved PBGC's decision to restore a terminated pension plan under 29 U.S.C. § 1347, a statute significantly different from § 1342.[14] Unlike § 1342, § 1347 does not require PBGC to

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[13] Under the APA, "[t]he reviewing court is not empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985).

[14] Section 1347 provides as follows:

> Whenever the corporation [PBGC] determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, should not be terminated under section 1341 or 1342 of this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 of this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to

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apply to the court for a decree adjudicating that a plan must be restored when the plan administrator disagrees with PBGC's decision. Although enforcement of PBGC's decision to restore a pension plan pursuant to § 1347 may require the assistance of a court, the restoration is accomplished, with or without the agreement of the plan administrator, solely on account of PBGC's informal agency action. Thus, *LTV's* application of the arbitrary and capricious standard to PBGC decision-making under § 1347 has no bearing on court adjudications under § 1342.

The third decision, *PBGC v. Haberbush,* No. CV0002631GHKAIJX, 2000 WL 33362003 (C.D.Cal. Nov.3, 2000), applied the APA's arbitrary and capricious standard because PBGC's determination to terminate a pension plan pursuant to § 1342 was "final agency action." *Id.* at *5. The *Haberbush* court also relied on *LTV,* reasoning that "the Supreme Court has held that the APA's arbitrary and capricious standard of review applies to a determination of the PBGC governed by the same set of statutory provisions at issue in this case." *Id.* at *6. However, PBGC's decision under § 1342(a) is only final agency action when the plan administrator waives § 1342's requirement for a court decree, and, as noted above, *LTV* is not relevant here.

Because the court must determine whether grounds for termination under § 1342(c) exist, and because there are factual disputes over whether termination of the Pilot

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restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

Plan is appropriate under those standards, *see supra,* n. 4, a trial on that question is necessary. As any plaintiff in typical civil litigation, PBGC will have the burden of proof at trial under a preponderance of the evidence standard. *See Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (in the absence of a statutory standard, the preponderance of the evidence standard is presumed to apply in civil actions unless particularly important individual interests or rights are at stake).[15]

C. PBGC's proposed December 30, 2004 termination date

If PBGC proves that the Pilot Plan must be terminated, it will be necessary to consider whether the notice it provided was sufficient to establish a termination date of December 30, 2004. Where, as here, PBGC and the plan administrator do not agree upon a termination date, the court must set one. 29 U.S.C. § 1348(a)(3), (4). Courts use a two-step process for establishing a termination date, taking into account (1) "the expectations of the plan participants" and (2) "the financial implications of the termination for PBGC." *See PBGC v. Republic Techs. Int'l, LLC,* 386 F.3d 659, 665 (6th Cir.2004) (collecting authorities). In that process, courts first determine the earliest

[15] The APA, as it applies to formal administrative hearings, places the burden of proof on the proponent of a rule or order. 5 U.S.C. § 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). Thus, if PBGC had been required to provide a formal agency hearing, its staff would have had the burden of proof with respect to plan termination. The fact that Congress provided for court adjudication under § 1342(c) as an alternative to a formal agency hearing further supports placing the burden of proof on PBGC as the proponent of the order adjudicating that the Pilot Plan must be terminated.

date by which the plan participants had actual or constructive notice of termination, since such actual or constructive notice is seen as effective to extinguish reliance interests. *See Republic Techs.,* 386 F.3d at 666; *PBGC v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.),* 707 F.2d 647, 652-53 (2d Cir.1983); *see also Eckstein v. Balcor Film Investors,* 58 F.3d 1162, 1168 (7th Cir.1995) (defining constructive notice as "not actual knowledge, but the ability to acquire knowledge by reasonably diligent inquiry"). Courts then select that date unless a later one better serves the interests of PBGC. *See Republic Techs.,* 386 F.3d at 667-68.

Rule 56(d) allows a court to narrow the issues for trial by determining facts not in controversy even when summary judgment cannot be granted. Fed.R.Civ.P. 56(d), incorporated by reference in Fed. R. Bankr.P. 56. *See Doctors Hosp. v. Desnick (In re Doctors Hosp.),* 330 B.R. 689 (Bankr.N.D.Ill.2005); *Carillo v. Bridgestone/Firestone, Inc.,* No. IP 00-9373-C-B/S, IP 00-5005-C-B/S, 2002 WL 1011781 at *1 (S.D.Ind. May 13, 2002); *First Nat'l Ins. Co. v. F.D.I.C.,* 977 F.Supp. 1051, 1055 (S.D.Cal.1997). Because there are no genuine issues of fact for trial, an order pursuant to Rule 56(d) is appropriate here to establish a termination date.

The undisputed facts demonstrate that the participants of the Pilot Plan received notice sufficient to extinguish any justifiable expectation that the plan would continue. The Notice of Determination was sent by PBGC on December 29, 2004, and received by ALPA the next day, December 30, 2004. Also, on December 30, 2004, the Notice of Determination was published in newspapers throughout the country. In addition, PBGC, United and

ALPA, published press releases announcing PBGC's decision to seek termination of the Pilot Plan.

United argues that the reasonable expectations of the plan participants weighed so heavily against PBGC's proposed termination date that their expectations should override the impact of notice. However, that is not the applicable standard. *See Republic Techs.,* 386 F.3d at 666 (reversing a ruling that "PBGC's notice to the participants did not presumptively terminate the participants' reliance interests" and noting that "[e]very court to consider the issue has concluded that expectation interests in the accrual of benefits are extinguished on the date the participants receive reasonable notice from PBGC that the plan is going to be terminated"). The Pilot Plan participants' expectation interests were extinguished on December 30, 2004, when they received reasonable notice from PBGC that it was seeking termination of the Pilot Plan. Moreover, PBGC was not required, as ALPA suggests, to provide individualized notice to each of the approximately 15,000 participants of the Pilot Plan.

To answer the second question – what date serves the interests of PBGC – the court need look no farther than PBGC's proposed date. *See PBGC v. Mize Co., Inc.,* 987 F.2d 1059, 1063 (4th Cir.1993) ("PBGC's interests should be deemed to be best served by the date proposed by PBGC.") There is no question that PBGC is better served by the December 30 date than some later date, and so the requirements for an effective notice on that date have been satisfied.

Conclusion

For the reasons stated above, the question of whether plan termination is appropriate must be adjudicated at trial but PBGC is entitled to an order establishing that its notice of December 30, 2004 termination date was effective. A separate order has been entered consistent with this decision.

332 B.R. 858

United States Bankruptcy Court, N.D. Illinois, Eastern Division

In re UAL CORPORATION, et al., Debtors.

Pension Benefit Guaranty Corporation, Plaintiff,

v.

United Air Lines, Inc., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan, Defendant,

and Air Line Pilots Association, International, United Retired Pilots Benefit Protection Association, Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno and William L. Rutherford, Intervenors.

Bankruptcy No. 02 B 48191.
Adversary No. 05 A 00481.

Oct. 26, 2005.

Jeffrey B. Cohen, John A. Menke, Shannon L. Novey, Nancy Heermans, Office of the General Counsel, Washington, D.C.; Christopher T. Sheean, Kelley Drye & Warren LLP, Chicago, IL, for Pension Benefit Guaranty Corp.

James H.M. Sprayregen, Marc Kieselstein, David R. Seligman, Jeffrey W. Gettleman, Kirkland & Ellis LLP, Chicago, IL, for United Air Lines, Inc.

Jack J. Carriglio, Eric E. Newman, James G. Argionis, Meckler Bulger & Tilson, Chicago, IL; Frank Cummings, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Washington, D.C., for United Retired Pilots Benefit Protection Association.

Fruman Jacobson, Patrick C. Maxcy, Sonnenschein, Nath & Rosenthal, Chicago, IL; Carole Neville, Mark A. Fink,

Sonnenschein, Nath & Rosenthal, New York, NY, for Committee.

Babette A. Ceccotti, Thomas N. Ciantra, Zachary N. LeedsCohen, Weiss and Simon, LLP; Stanley Eisenstein, Katz, Friedman, Eagle, Eisenstein & Johnson, P.C., Chicago, IL, for Air Line Pilots Association.

David Heller, Timothy Barnes, Latham & Watkins, Chicago, IL, for DIP lender (BancOne).

Richard S. Toder, Jay Teitelbaum, Morgan, Lewis & Bockius, LLP, New York, NY; Michael B. Solow, Kaye, Scholer, LLP, Chicago, IL, for DIP lender (Citibank and JP Morgan).

Robert J. Mrofka, Schulte, Roth & Zabel, New York, NY, for DIP lender (CIT Group).

Richard P. Krasnow, Scott E. Cohen, Weil, Gotshal & Manges, LLP, New York, NY, for DIP lender (General Electric Capital Corporation).

MEMORANDUM OF DECISION

EUGENE R. WEDOFF, Bankruptcy Judge.

This adversary proceeding, brought by the Pension Benefit Guaranty Corporation ("PBGC"), seeks a decree terminating a pension plan sponsored by United Air Lines ("United"), whose Chapter 11 bankruptcy case is pending in this court. The proceeding is before the court for judgment after trial. The issue for trial was whether termination of the plan in question – the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan") – was necessary, as of December 30, 2004, "to avoid . . . any unreasonable increase in the liability of [PBGC's insurance] fund."

29 U.S.C. § 1342(c). As discussed below, PBGC established by a preponderance of the evidence that termination was necessary to avoid an unreasonable increase in liability. Judgment will therefore be entered in favor of PBGC, ordering termination of the plan as of December 30, 2004.

Jurisdiction and Factual Background

This proceeding was previously before the court on PBGC's motion for summary judgment. As set out in the opinion denying that motion, this is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as to which the court may enter a final judgment. *See Amended Memorandum of Decision on Motion for Summary Judgment*, at 2-3.

The undisputed background facts, reflected in the summary judgment opinion, can be summarized briefly. Pursuant to a collective bargaining agreement that it entered into with the Air Line Pilots Association, International ("ALPA"), United has maintained the Pilot Plan, offering benefits to approximately 15,000 active, retired, and terminated employees. On December 29, 2004, PBGC made an administrative determination under 29 U.S.C. § 1342(a)(4) that the Pilot Plan should be terminated as of December 30, and notified both United and ALPA of this determination. On December 30, notice of the determination was issued through advertisements in major newspapers, press releases, and announcements on the websites of the PBGC, United, and ALPA. As required by an agreement that it had reached with ALPA, United, as plan administrator, did not agree to termination of the plan as of December 30, although it had long maintained that the plan needed to be terminated.

In addition to providing notice of its administrative determination on December 30, PBGC also filed a complaint against United in the district court, seeking a judicial decree adjudicating that the plan must be terminated pursuant to 29 U.S.C. § 1342(c). That complaint was referred to this court and became the pending adversary proceeding. ALPA intervened in the proceeding, as did the United Retired Pilots Benefit Protection Association ("URPBPA"), a not-for-profit Illinois corporation formed in connection with United's bankruptcy to protect the pension benefits of its members.

PBGC moved for summary judgment, asserting that the court's role under § 1342(c) was to review PBGC's decision that termination was necessary, using the "arbitrary and capricious" standard applicable to judicial review of informal agency action under the Administrative Procedure Act. 5 U.S.C. § 706. In ruling on this aspect of the motion, this court held, to the contrary, that PBGC had to prove by a preponderance of the evidence the elements for relief under § 1342(c) – that is, that termination of the Pilot Plan was necessary "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or to avoid any unreasonable increase in the liability of [PBGC's insurance] fund." Because there were facts in dispute regarding this issue, summary judgment was denied. At the same time, however, PBGC sought a determination of the sufficiency of its notice of termination on December 30, 2004. Here, the court ruled that the uncontested facts established that the notice was effective. Thus, if PBGC established its case for termination as of December 30, that would be the effective date for termination of the Pilot Plan.

The pretrial submissions of the parties limited the issue for trial to the final ground for termination set out in § 1342(c): whether termination of the Pilot Plan as of December 30, 2004 was necessary to avoid an "unreasonable increase in the liability of the fund."

Findings of Fact

Most of the evidence at trial involved the extent of the loss that PBGC's fund would incur if termination of the Pilot Plan were delayed until after December 30, 2004. PBGC presented testimony from two actuaries on this question; ALPA and URPBA [sic] presented testimony from one additional actuarial expert apiece. The only other witness was a PBGC attorney whose testimony was ruled largely inadmissible. The documentary evidence consisted of excerpts from PBGC's administrative record and other internal documents (PBGC Ex. 1; ALPA Ex. 16-19); the agreements between United and ALPA, modifying their collective bargaining agreement, entered into during December 2004 (PBGC Ex. 3; ALPA Ex. 5) and January 2005 (ALPA Ex. 6); and reports and other materials prepared by the parties' expert witnesses (PBGC Ex. 4 and 5; ALPA Ex. 9, 13, and 21-25; URPBPA Ex. 1 and 2). United introduced no evidence.

The major factual disagreement – the precise extent of the increase in PBGC's liability that would result from termination of the Pilot Plan after December 30, 2004 – is a narrow one. PBGC's experts testified that if the plan were terminated in January 2005 instead of December 2004, PBGC's liability would increase by $44 million; ALPA's expert testified that the increase would be $39 million. PBGC's experts testified that each month of

further delay, through June 2005, would add $9.5 million to this increase in liability; ALPA's expert put the monthly increase at $6.7 million. See ALPA Ex. 21. Thus, PBGC contends that the total increase in its liability for the Pilot Plan from December 2004 through June 2005 would be $101 million, whereas ALPA contends that the increase would be $79 million. URPBPA's expert did not opine on this issue.

Under the legal standard applied below, these differences in calculating increased liability do not affect the need for plan termination on December 30, 2004. Nevertheless, the weight of evidence supports PBGC's position as to the January increase and ALPA's position as to the monthly increases thereafter.

As to the initial increase in liability, the experts agreed that a statutory increase in the maximum guaranteed pension would result in a substantial increase in PBGC liability since many participants in the Pilot Plan were entitled to plan benefits in excess of the amount guaranteed by PBGC. For each of these participants, an increase in maximum benefits guaranteed by PBGC that became effective January 1, 2005 would add to the fund's liability if the plan were not terminated before that date. PBGC documented its calculation of this increased liability, and ALPA's expert gave no reason for his lower estimate.

However, as to the difference in monthly increases thereafter, PBGC failed to document its correction of an initial, acknowledged error in calculating the impact of a non-terminated plan paying benefits in excess of guaranteed amounts. See PBGC Ex. 6, with an imbedded footnote failing to reflect the correction. Moreover, ALPA's expert

used a methodology that consistently reduced the monthly liability increases to present value. PBGC criticized this methodology as failing to account for factors affecting PBGC liability that were independent of the termination date, but PBGC did not demonstrate any such independent factors that would have artificially lowered the liability increase resulting from termination delay. In the end, then, the balance of the evidence adduced at trial indicates that PBGC faced an immediate liability increase of $44 million if the Pilot Plan were terminated in January 2005 rather than December 30, 2004, and that its liability would increase by $6.7 million each month thereafter through June 2005, resulting in a total increase in liability as of that date in the amount of $84.2 million.

Conclusions of Law

The applicable standard. Whatever the increase in liability that PBGC would incur as a result of the Pilot Plan terminating after December 2004, the real question is whether the increase would be "unreasonable," as required for termination under § 1342(c). ALPA argues that the increase – whether $79 million, $101 million, or some point in between – would not be unreasonable, because the entirety of any such increase would be the result of the ordinary application of statutory provisions to the operation of the plan. And indeed, there were no "extraordinary" events, such as plan amendments becoming effective after the proposed termination date, that would have increased the liability. PBGC, on the other hand, argues that any substantial increase in its liability for a plan – regardless of the cause of the increase – would be unreasonable under the statute and that, accordingly,

an increase in the millions of dollars necessarily satisfies the requirement for plan termination.

There is room for dispute here, since the statute provides no definition of reasonableness in this context, and there is little helpful case law[1] or legislative history.[2] Nevertheless, the operation of § 1342(c) in the overall structure of ERISA, together with the change in its language enacted in 1980, indicates that an "unreasonable"

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[1] The only published opinion discussing the meaning of an "unreasonable increase" in PBGC liability under § 1342(c), holds – contrary to the result reached by this court – that § 1342(c) places no burden on PBGC to establish an unreasonable increase in its liability, but rather requires parties opposing termination to establish that PBGC had acted arbitrarily or capriciously in asserting that such an increase would occur. *In re Pan American World Airways, Inc. Cooperative Ret. Inc. Plan*, 777 F.Supp. 1179, 1182 (S.D.N.Y.1991). In that context, the court stated that an "unreasonable increase" in liability might be any increase in excess of "a slight or insubstantial deterioration in a plan's condition," caused, for example, by "day to day deviations as the normal vagaries of a plan's investments." *Id.* at 1182-83. The court applied this interpretation because there was "no showing" that it was incorrect. *Id.* It is questionable whether the court would have applied this interpretation had it placed the burden of establishing an unreasonable liability increase on PBGC.

[2] As discussed in *Pan Am.*, 777 F.Supp at 1182, the "unreasonable increase" language now in § 1342(c) was "further increase" in the original version of ERISA. The change was made by § 402(a)(6)(D) of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364. However, this change was not mentioned either in the House Report on this legislation, H.R.Rep. No. 96-869, or in any of the floor debates. Two committee prints on the legislation merely reflect the changed language in § 1342(c), offering no analysis of the impact of the change or its rationale. Staff of Subcomm. on Labor-Management Relations of House Education and Labor Comm., Changes in Existing Law Made by the Bill H.R. 3900 49 (Comm. Print 1980); Staff of Sen. Comm. on Labor and Human Resources, S. 1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 100, 246 (Comm. Print 1980).

increase in liability must involve both a monetarily significant increase in PBGC's liability and a plan likely to terminate in an underfunded condition, so that the increase in liability would be reflected in an actual additional loss for PBGC's insurance fund.

PBGC v. Heppenstall Co., 633 F.2d 293, 295-97 (3d Cir.1980), the first court of appeals decision to address ERISA's program of pension insurance, explains the basic features of the program. PBGC administers a fund to guarantee minimum benefits to participants in pension plans that terminate without sufficient assets to pay the benefits promised. PBGC's fund is self-financed, primarily through premiums charged to the plans covered by the insurance program. When a plan operates without sufficient funding, PBGC's liability to the plan participants can increase in several ways, including depletion of the plan assets and increases in PBGC's guaranteed payouts. If PBGC and the plan administrator (usually the employer) agree that an underfunded plan should be terminated as of a particular date, PBGC takes over administration of the plan's assets as trustee and begins paying the benefits defined by statute as of the termination date. If the plan administrator does not agree to a termination date PBGC proposes, then PBGC must obtain a judicial decree terminating the plan and establishing the termination date.

In *Heppenstall*, the court was required to determine what standards should govern a court's choice of a termination date under 29 U.S.C. § 1348(b)(2). The court approached this question by identifying the competing interests involved: PBGC's interest as an insurer in promptly terminating an underfunded plan in order to avoid additional losses to its insurance fund, and the plan participants' interest in receiving expected plan benefits.

Heppenstall, 633 F.2d at 301-02. A similar approach is appropriate in defining the "unreasonable increase in liability" that requires termination of a plan under § 1342(c). This ground for termination balances the same interests that *Heppenstall*-PBGC's interest as insurer is advanced by terminating a plan if continued operation will likely deplete PBCG's insurance fund; the participants' interest in receiving expected benefits is advanced by not terminating a plan if such depletion is unlikely.

The likelihood of a depletion of PBGC's fund, then, is the touchstone, and it implies the consideration of both increased liability and likelihood of plan termination. First, even with a severely underfunded plan, continued operation may not lead to increased liability for PBGC. If the plan's own benefits are below the statutorily guaranteed levels and payouts under the plan are not increasing, continued operation of the plan will not increase PBGC's liability. Second, even if PBGC's liability does increase significantly, the increase will not lead to a loss to PBGC if the plan is be able to continue in operation successfully, through increased future contributions from the sponsor or otherwise. The increase in liability in this situation would not be "unreasonable."

The most plausible reading of the action Congress took in amending § 1342 (*see* n. 2, *supra*) supports this interpretation. By changing "further increase" to "unreasonable increase," Congress necessarily recognized the possibility that PBGC could be required to accept certain increases in liability arising from continued operation of underfunded plans. Given the interests of the parties involved, these "reasonable" increases would be those resulting from plans that can operate successfully.

ALPA's contrary argument – that any increase in liability is reasonable if it occurs in the ordinary course of a plan's operation, rather than as a result of some extraordinary event such as a plan amendment – simply ignores the interest of the PBGC that involuntary termination is intended to protected [sic]. ALPA's interpretation would allow a plan to continue indefinitely, exhausting its assets, while PBGC's liability for guaranteed payments increased, so long as no extraordinary event intervened. There is no basis for reading such an intent into the statute.

Application of the standard. When the two-part standard for an unreasonable increase in liability is applied to the facts in this case, it becomes apparent that PBGC has established cause for termination. First, the increase of $44 million that PBGC would incur if termination does not occur before January 1, 2005, is certainly a significant amount. Liability increases of much smaller amounts have been seen as grounds for termination, without argument. *See, e.g., Heppenstall*, 633 F.2d at 300 (noting termination based on an increase in liability of $3-4 million). Although this increase may not be large in relation to PBGC's overall liability for the Pilot Plan, that cannot be the appropriate standard when PBGC's interest in protecting its fund is considered. The impact of increased liability on PBGC's insurance fund is not changed by total liability a particular plan presents. To protect its fund, § 1342(c) allows PBGC to seek to avoid any significant increases in liability with respect to plans likely to fail.

Second, the only evidence bearing on the issue indicates that the Pilot Plan would not continue.[3] PBGC's administrative record reflected United's repeated statements in this case that termination of all of its defined benefit pension plans would be necessary for it to reorganize successfully, and United's agreements with ALPA and the PBGC contemplated such a termination. Accordingly, even though no witness testified on the subject, PBGC sustained its burden of establishing the likelihood of plan termination.

Conclusion

As discussed above, PBGC has shown that continued operation of the Pilot Plan beyond December 30, 2004 would result in an unreasonable increase in the liability of its fund, and so is entitled to a decree pursuant to 29 U.S.C. § 1342(c) terminating the plan as of that date. The decree will be issued in a separate document.

[3] URPBPA's expert advanced the theory that termination of the Pilot Plan was not necessary because an amended defined benefit plan could be successfully implemented. However, the expert acknowledged that United was not willing to pursue such an amendment, and so this alternative, even if theoretically possible, was unlikely to occur.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In re: **UNITED AIRLINES, INC., et al.,** **Debtors.**	**Chapter 11** **Case No. 02-B-48191 (Jointly Administered)**
PENSION BENEFIT GUARANTY CORPORATION, **Plaintiff,** **vs.** **UNITED AIRLINES, INC., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,** **Defendant,** **and** **AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ROGER D. HALL, DENNIS D. DILLON, GERARD TERSTIEGE, EUGENE M. CUMMINGS, RAYMOND P. FINK, JAMES M. KRASNO and WILLIAM L. RUTHERFORD,** **Intervenors.**	**Adversary Proc. No. 05-481** **Honorable Eugene R. Wedoff**

ORDER TERMINATING THE UNITED AIRLINES PILOT DEFINED BENEFIT PENSION PLAN

This adversary proceeding having come before the court on Pension Benefit Guaranty Corporation's ("PBGC") complaint (the "Complaint") to terminate the United Airlines Pilot Defined Benefit Pension Plan (the "Plan"); the court having considered the briefs and arguments of the parties, and having conducted a trial on the merits of PBGC's Complaint; it is hereby ordered, for the reasons stated in the Memorandum of Decision issued in connection herewith:

1. Judgment is entered in favor of PBGC with respect to its request to terminate the Plan;

2. The Plan is terminated pursuant to 29 U.S.C. § 1342;

3. The termination date of the Plan is December 30, 2004, pursuant to 29 U.S.C. § 1348;

4. PBGC is appointed statutory trustee of the Plan pursuant to 29 U.S.C. § 1342; and

5. United, its agents, and any other person or entity having possession, custody, or control of any records, assets, or other property of the Plan, and any documents required to determine the benefits payable to participants of the Plan, shall transfer, convey, and deliver all such records, assets, property, and documents to PBGC.

Dated: October 26, 2005
Chicago, Illinois

/s/ Eugene R. Wedoff
Hon. Eugene R. Wedoff
United States Bankruptcy Judge

337 B.R. 904

United States District Court, N.D. Illinois,
Eastern Division
In re UNITED AIR LINES, INC., Debtors.
Air Line Pilots Association International, United Retired Pilots Benefit Protection Association, Roger D. Hall, Dennis D. Dillon, Gerald Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno and William L. Rutherford, Appellant and Cross-Appellees,
v.
Pension Benefit Guaranty Corp.,
Appellee and Cross-Appellant.
No. 05 C 6955.

Feb. 2, 2006.

James Howard Mandell Sprayregen, Chad John Husnick, David Richard Seligman, Michael B. Slade, Kirkland & Ellis LLP, Chicago, IL, for Debtors.

Babette A. Ceccotti, Cohen, Weiss and Simon, New York, NY, for Appellant and Cross-Appellees.

Christopher Todd Sheean, Wildman, Harrold, Allen & Dixon LLP, Matthew C. Luzadder, Matthew Charles Luzadder, Kelley, Drye & Warren, Chicago, IL, Nancy Heermans, Paula Connelly, Shannon L. Novey, Stephanie L Thomas, Jeffrey B. Cohen, Pension Benefit Guaranty Corporation, Washington, DC, for Appellee and Cross-Appellant.

MEMORANDUM OPINION AND ORDER

DARRAH, District Judge.

This matter comes before the Court on the appeal and cross-appeal of the final judgments of the Bankruptcy

Court of October 26 and October 28, 2005. For the reasons that follow, the decisions of the Bankruptcy Court as to the October 26 and October 28, 2005 orders are reversed.

BACKGROUND

United Air lines, Inc. provides many of its employees pension benefits under defined benefit pension plans. One of these defined plans is the United Air Lines Pilot Defined Benefit Pension Plan ("the Pilot Plan"). United is the plan sponsor and administrator. The Air Line Pilots Association ("ALPA") is the union that represents United's active pilots. The United Retired Pilots Benefit Protection Association ("URPBPA") is an Illinois non-profit corporation which was formed by a group of retired United pilots to protect the retirement benefits of pilot retirees, survivors, and dependants. Roger Hall, Dennis D. Dillon, Gerald Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno, and William L. Rutherford are retired United Captains who serve on URPBPA's Board of Directors.

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established by Title IV of the Employee Retirement Income Security Act ("ERISA"). The PBGC guarantees the payment of certain, but not all, pension benefits provided by defined benefit pension plans that are covered by Title IV of ERISA.

On December 9, 2002, United filed a voluntary petition under Chapter 11 of Title 11, United States Code. In November 2004, United stated that it would seek the termination of the Pilot Plan and its other defined pension

plans via a two-step process. First, United would attempt to satisfy the requirements of 11 U.S.C. § 1113 and remove any contractual obligations that required United to maintain the Pilot Plan. Second, United would attempt to satisfy ERISA's requirements for distress termination.

On November 24, 2004, United initiated negotiations with ALPA regarding the Pilot Plan. After URPBPA sought to be included in the negotiations related to the Pilot Plan, and United refused to include URPBPA in these discussions, URPBPA filed a motion with the Bankruptcy Court, requesting the appointment of an authorized representative to represent United's retired pilots and their pension benefits. The Bankruptcy Court denied URPBPA's motion, and that order is on appeal before the Seventh Circuit Court of Appeals.

As a result of their negotiations, United and ALPA reached a Section 1113 Agreement. On December 17, 2004, United filed a Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with ALPA. United's initial motion was denied. Subsequently, United filed for approval of a modified version of the agreement. Both the original and modified versions of the agreement provided, in pertinent part, that ALPA would not "oppose the Company's efforts to terminate the A Plan under 29 U.S.C. § 1341(c)" as long as United did not seek to terminate the Pilot Plan before May 2005. Both versions also provided that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341, and that nothing in the Letter of Agreement "shall be construed, deemed or characterized by UAL or the Company as any agreement of any form by the Association that the A Plan should be terminated."

On December 29, 2004, the PBGC sent a Notice of Determination to Glenn Tilton (United's Chairman, President and CEO), informing Tilton that PBGC had determined that the Pilot Plan "must be terminated because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated." PBGC stated that the effective date of the termination would be December 30, 2004.

On December 30, 2004, PBGC filed a Complaint in the United States District Court for the Northern District of Illinois, pursuant to 29 U.S.C. §§ 1342 and 1348(a), seeking: (1) an order terminating the Pilot Plan sponsored by United; (2) appointing PBGC as the statutory trustee of the Pilot Plan; (3) establishing December 30, 2004 as the termination date of the Pilot Plan; and (4) requiring that United convey all relevant documents to PBGC. PBGC's Complaint, Civil Case No. 04 C 8338, was assigned to Judge Joan Lefkow.

On January 4, 2005, United moved for referral of the termination action to the Bankruptcy Court. On January 6, 2005, PBGC filed it opposition to the referral to the Bankruptcy Court and, in the alternative, sought to withdraw the reference. Shortly thereafter, ALPA and URPBPA sought to intervene in the District Court action. On January 25, 2005, Judge Lefkow granted United's motion to confirm the automatic referral of the case to the Bankruptcy Court and denied PBGC's motion to withdraw the reference. During the hearing, Judge Lefkow agreed with PBGC's counsel that the termination proceeding was

a non-core proceeding.[1] The motions to intervene were also referred to the Bankruptcy Court. PBGC moved for reconsideration of the referral to the Bankruptcy Court or, in the alternative, for a certification to file an interlocutory appeal. The motion remains pending.

On April 13, 2005, the Bankruptcy Court ruled that discovery beyond the administrative record would be permitted. On June 6, 2005, PBGC filed a motion for summary judgment, arguing that PBGC's decision to seek termination of the Pilot Plan was entitled to judicial deference and that its decision to initiate termination had not been arbitrary or capricious. PBGC also argued that it had provided sufficient notice to the plan participants to set the termination date as December 30, 2004. United, ALPA, and URPBPA opposed PBGC's motion for summary judgment.

On August 26, 2005, the Bankruptcy Court issued a preliminary ruling on PBGC's motion for summary judgment. On October 26, 2005, the Bankruptcy Court issued an Amended Memorandum of Decision on Motion for Summary Judgment. The Bankruptcy Court ruled that PBGC's adversary proceeding was a core proceeding; therefore, the Bankruptcy Court entered final judgment. As to the merits of the motion, the Bankruptcy Court held that a trial was required as to whether PBGC established the propriety of terminating the Pilot Plan by a preponderance of the evidence. The Bankruptcy Court held that

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[1] Ms. Hermans: – and that is of judicial economy. Counsel for United is confused. The – the bankruptcy court – because this is a non-core proceeding, and clearly it is, it does not arise only in the context of a bankruptcy court –

The Court: I agree with you.

Section 1342(c) required a *de novo* determination of the appropriateness of the Pilot Plan termination, and not a deferential review under the Administrative Procedures Act. The Bankruptcy Court also held that the constructive notice to the Pilot Plan participants was sufficient to establish a termination date of December 30, 2004.

A bench trial on PBGC's Complaint was commenced on September 21, 2005. On October 26, 2005, the Bankruptcy Court issued its Memorandum of Decision. The Bankruptcy Court held that PBGC showed that continued operation of the Pilot Plan beyond December 30, 2004, would result in an unreasonable increase in PBGC's liability of its fund; therefore, PBGC was entitled to a decree terminating the Pilot Plan pursuant to 29 U.S.C. § 1342(c) as of December 30, 2004. On October 28, 2005, the Bankruptcy Court entered its order terminating the Pilot Plan retroactive to December 30, 2004.

On November 4, 2005 and November 7, 2005, respectively, ALPA and URPBPA filed notices of appeal. On November 16, 2005, PBGC filed its cross-appeal. The parties' appeals of the Bankruptcy Court's final orders were assigned to this Court, Civil Case No. 05 C 6955.

LEGAL STANDARD

A bankruptcy court's interpretation of statute is a question of law reviewed *de novo*. *See Meyer v. Rigdon*, 36 F.3d 1375, 1378 (7th Cir.1994). Similarly, a bankruptcy court's grant of summary judgment is reviewed *de novo*. *Hoseman v. Weinschneider*, 322 F.3d 468, 473 (7th Cir.2003) (*Hoseman*). All of the facts and the inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Hoseman*, 322 F.3d at 473. The court

reviews the bankruptcy court's factual findings for clear error. *Hoseman*, 322 F.3d at 473.

ANALYSIS

PBGC raises three issues on appeal: (1) the District Court erred in referring the termination proceeding to the Bankruptcy Court, (2) the Bankruptcy Court erred in finding the termination was a core proceeding, and (3) the Bankruptcy Court erred by holding a *de novo* trial. In its response brief to PBGC's appeal, URPBPA joins in PBGC's argument that the Bankruptcy Court did not have jurisdiction (PBGC's first two grounds of appeal) to enter a final order in the adversary proceeding. United argues, *inter alia*, that PBGC's cross-appeal should be dismissed as untimely.

Pursuant to 28 U.S.C. § 158, a party may appeal the final judgment of a bankruptcy court to an appropriate district court. The notice of appeal must be filed with the clerk within ten days of the date of the entry of the judgment, order, or decree being appealed. Fed. R. Bank. P. 8002(a). However, if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date of which the first notice of appeal was filed. Fed. R. Bank. P. 8002(a). The time frames prescribed by Rule 8002(a) are conditions precedent that are mandatory and jurisdictional. *See In re Bond*, 254 F.3d 669, 673 (7th Cir.2001).

Here, the Bankruptcy Court entered the termination order on October 28, 2005. ALPA filed a timely notice of appeal on November 4, 2005. However, PBGC did not file its appeal until November 16, 2005 – twelve days after the

first notice of appeal was filed. Accordingly, PBGC's cross-appeal is untimely and is dismissed.

However, PBGC, as cross-appellant and appellee, and URPBPA (including the individual intervenors) raise issues of the Bankruptcy Court's jurisdiction, which may be raised at any time, including during the appeal. *See Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Accordingly, PBGC and URPBPA's jurisdiction argument is addressed by the Court.[2]

PBGC and URPBPA argue that the Bankruptcy Court did not have jurisdiction to enter a final judgment in the termination proceeding because the termination was not a core proceeding.

Bankruptcy courts have jurisdiction to adjudicate and issue final orders and judgments in matters constituting core proceedings. *See* 28 U.S.C. § 157(b)(1). Although the statute does not define "core," Section 157(b)(2) sets forth a non-exclusive list of matters that constitute a core proceeding. This non-exclusive list includes "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship. . . ." 28 U.S.C. § 157(b)(2)(O).

However, a non-core proceeding cannot be reclassified as a core proceeding by simply declaring that the matter

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[2] This Court has jurisdiction over the appeal of the Bankruptcy Court's final judgment. *See* 28 U.S.C. § 158(a). PBGC's appeal of the District Court's referral cannot be heard by this Court as this Court lacks jurisdiction over an appeal of another District Court's decision, and the Bankruptcy Court made no rulings as to this issue. Accordingly, this issue is not addressed by this Court.

either concerns the administration of the estate or affects the liquidation of the assets. *See In re Comdisco Ventures, Inc.*, 2004 WL 1375353 (N.D.Ill. June 18, 2004) (*In re Comdisco*); *In re CIS Corp.*, 172 B.R. 748, 757 (S.D.N.Y.1994) (*In re CIS*). Instead, "a proceeding is core . . . if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir.1990) *quoting In re Wood*, 825 F.2d 90, 97 (5th Cir.1987). In slightly different terms, the Seventh Circuit has defined core proceedings as:

> actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law. . . . The fact that it is an *important* right to the bankrupt . . . is irrelevant.

In re U.S. Brass Corp., 110 F.3d 1261, 1268 (7th Cir.1997).

Bankruptcy courts may also hear non-core proceedings that are otherwise related to the bankruptcy case. *See* 28 U.S.C. § 157(c)(1). The bankruptcy court's jurisdiction to hear non-core proceedings is limited. *See In re Hanno*, 254 B.R. 732, 738 (Bankr.N.D.Ill.2000); *In re Markos Gurnee Partnership*, 182 B.R. 211, 220 (Bankr.N.D.Ill.1995). In non-core proceedings, which are also undefined in the statute, the bankruptcy court may issue findings of fact and conclusions of law but is not empowered to issue final orders unless the parties consent to the bankruptcy court's issuing a final order. *See* 28 U.S.C. 157(c). The bankruptcy court's findings of fact and conclusions of law are then reviewed *de novo* by the district court. *See* 28 U.S.C. 157(c)(1).

Here, PBGC brought a proceeding to terminate the Pilot Plan in district court pursuant to Title IV of ERISA, 29 U.S.C. § 1342(a)(4), (c). Title IV of ERISA is the exclusive means of terminating a defined benefit pension plan. 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). Termination proceedings may be filed notwithstanding any pending bankruptcy proceeding. 29 U.S.C § 1342(e). PBGC brought the proceeding against United as the plan administrator, not as the debtor in the pending bankruptcy.

PBGC's right to initiate the termination proceeding of the Pilot Plan arises exclusively from Title IV of ERISA, not the Bankruptcy Code. *See* 29 U.S.C. §§ 1341(a); 1342(a). The right to bring the termination proceeding exists outside the Bankruptcy Code and can arise outside the context of a bankruptcy case. *See* 29 U.S.C. § 1342(a). Accordingly, the termination proceeding neither invokes a substantive right provided by Title 11 nor, by its nature, could it arise only in the context of a bankruptcy case.

In light of the above, United, the only party that contends that the proceeding was a core proceeding, argues that the involuntary termination proceeding was a core proceeding because whether and when the Pilot Plan was terminated affected PBGC's claim that arose once the Pilot Plan was terminated; therefore, the termination proceeding affected the administration of the estate and/or the debtor-creditor relationship. However, the mere fact that the proceeding may ultimately affect the size of the estate does not mandate that the proceeding is a core proceeding. *See Diamond Mortgage Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1239 (7th Cir.1990) (malpractice and breach of contract suit resolution which may have a direct and substantial impact on the asset pool available for

distribution to the estate was a non-core proceeding); *In re U.S. Brass*, 110 F.3d at 1268-69 (fact that bankrupt party was seeking $500 million in insurance coverage that could affect size of estate did not turn state contract law claim relating to the insurance coverage into a core proceeding); *In re CIS*, 172 B.R. at 757 (legal proceeding that could determine that the debtors were the legal titleholders to certain property, while benefitting the bankrupt estate, was insufficient to make the proceeding a core proceeding); *In re Comdisco*, 2004 WL 1375353 at *4 (claims that might benefit debtor estate that did not constitute a substantive right granted by Title 11 constituted non-core proceedings).

Furthermore, any additional effect on the debtor-creditor relationship is tenuous. The termination proceeding was brought by PBGC as the federal agency that enforces Title IV of ERISA, not in the role of a creditor. In addition, United is a party to the proceeding not as the debtor but as the plan administrator. Had a person or entity other than United been the plan administrator, United would not have been a party to the proceeding. In addition, while the termination proceeding may ultimately affect United's bankruptcy case, it does not concern the administration of the estate or involve estate assets within the meaning of Section 157(b)(2) of the Bankruptcy Code because plan assets are not part of a bankruptcy estate. *See Patterson v. Shumate*, 504 U.S. 753, 760, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992).

Based on the above, the termination proceeding filed by PBGC pursuant to Title IV of ERISA was a non-core proceeding. Because the proceeding was a non-core proceeding and the parties did not consent to the Bankruptcy Court's issuing a final judgment, the Bankruptcy Court

exceeded its limited jurisdiction by issuing a final judgment instead of submitting proposed findings of fact and conclusions of law to the district court (in this instance, Judge Joan Lefkow in Civil Case 04 C 8338), as required by Section 157(c)(1). Accordingly, the October 26 and October 28, 2005 final judgments of the Bankruptcy Court are reversed; and the case is remanded for proceedings consistent with 28 U.S.C. § 157(c).

In light of the above ruling, ALPA and URPBPA's appeals are dismissed as moot.

CONCLUSION

Based on the foregoing, the October 26 and October 28, 2005 final orders of the Bankruptcy Court are reversed; and the case is remanded for proceedings consistent with 28 U.S.C. 157(c). PBGC's appeal is dismissed as untimely. ALPA and URPBPA's appeals are dismissed as moot.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	**Chapter 11**
UAL Corporation, et al.,	)	**Case No. 02 B 48191**
Debtors.	)	
	)	
Pension Benefit Guaranty Corporation,	)	
Plaintiff,	)	
v.	)	
United Air Lines, Inc., as Plan Administrator for the United Airlines Pilot Defined Benefit Pension Plan,	)	**Adversary No. 05 AP 00481**
Defendant,	)	
and	)	
Air Line Pilots Association, International, United Retired Pilots Benefit Protection Association, Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno and William L. Rutherford,	)	
Intervenors.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT AND FOLLOWING TRIAL

(Filed Feb. 13, 2006)

On October 26, 2005, the court issued an Amended Memorandum of Decision on Motion for Summary Judgment [Docket No. 147] and a Memorandum of Decision [Docket No. 148] in the above-entitled adversary proceeding. On February 2, 2006, the district court issued its Memorandum Opinion and Order in which it determined that the court did not have core jurisdiction over this adversary proceeding and thus, the court is limited, in the absence of consent from the parties, to making recommendations to the district court, which alone may enter a final order resolving the proceeding. 28 U.S.C. § 157(c)(1). Accordingly, the court adopts as its recommendation to the district court the two previously issued memoranda, with the exception of those portions of the memoranda that address the court's jurisdiction. Copies of the memoranda are attached hereto as Exhibits A and B.

Dated: February 13, 2006 /s/ Eugene R. Wedoff
Eugene R. Wedoff
United States
Bankruptcy Judge

[Exhibit A is reproduced *infra* App. 52 to App. 73.]

[Exhibit B is reproduced *infra* App. 74 to App. 85.]

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John W. Darrah	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 6220	DATE	2/23/06
CASE TITLE	In re: United Air Lines (Filed Feb. 24, 2006)		

DOCKET ENTRY TEXT

On February 2, 2006, this Court, in a Memorandum Opinion and Order in case number 05-C-6955, reversed the Bankruptcy Court's October 26, 2005 order terminating the United Air Lines Pilot Defined Benefit Pension Plan. Appellant claims the termination of the plan as a basis for this appeal. United's appeal of the October 6, 2005 order is, therefore, dismissed for lack of ripeness.

/s/ John W. Darrah
2/23/06

Docketing to mail notices.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Eugene R. Wedoff **Hearing Date** Oct. 6, 2005

Bankruptcy Case No. 02-B-48191 **Adversary No.** _____

Title of Case UAL -

Brief Statement of Motion

Motion of ALPA and URPBPA to compel payments of non-qualified benefits and continued processing of pension applications
#12980

Names and Addresses of moving counsel

Babette Ceccotti
Jack Carriglio

Representing

ALPA and URPBPA

ORDER

For the reasons stated in open court, the motion is granted and the effective date of this order will be Oct. 7, 2005 at 5:00 p.m.

/s/ Eugene R. Wedoff

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UAL Corporation,	)	No. 02 B 48191
	)	Chicago, Illinois
	)	9:30A.M.
Debtor.	)	October 6, 2005

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE EUGENE R. WEDOFF

APPEARANCES:

For the Debtor:	Mr. David Seligman;
For URPBPA:	Mr. Jack Carriglio;
Appearing Telephonically:	
For ALPA:	Ms. Babette Ceccotti;
Court Reporter:	Amy Doolin, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604.

[2] THE CLERK: UAL Corporation, 02 B 48191, emergency motion of ALPA.

MR. CARRIGLIO: Good morning, Your Honor. Jack Carriglio on behalf of the Retired Pilots.

MR. SELIGMAN: Good morning, Your Honor. David Seligman on behalf of the debtors.

THE COURT: Is there an appearance by telephone?

MS. CECCOTTI: Yes. Good morning, Your Honor. Babette Ceccotti for the Air Line Pilots Association.

THE COURT: Mr. Carriglio, this is effectively a motion for a mandatory injunction.

MR. CARRIGLIO: I believe, Your Honor, it's a motion based on Your Honor's prior ruling.

THE COURT: It is a motion for a mandatory injunction. You want me to order United Airlines to make payments to your clients, right?

MR. CARRIGLIO: It's a joint motion, and it is similar to the last motion to compel that was done by ALPA under 1113 to enforce the agreement that was reached as of January 2005. So it is styled, I believe, Judge, the same as the last motion under 1113 that you granted.

[3] THE COURT: Mr. Seligman.

MR. SELIGMAN: I would just like to make two points quickly. Obviously, we've stated our position before. But the first point is, Your Honor, again, this is a bankruptcy case. It is about doing equity. It is about treating similar creditors similarly. And that's our job. United is a fiduciary of this estate.

Your Honor has indicated your ruling. Yes, you haven't entered an order yet, but we believe at this point the claims of the pilots for these nonqualified benefits will be unsecured claims. And to force us to make this payment would treat them in a position superior to other similarly-situated creditors.

This litigation has been pending since December 30th. If by fortune the matter had been ruled on in January, let's say, with a December 30th effective date, we would not have had to pay so far the $54 million that we have paid. And I think this time the day of reckoning has come. And, again, just because you haven't –

THE COURT: What's the argument against the application of Section 1113 here?

MR. SELIGMAN: What I would say with [4] respect to that is, if Your Honor recalls your ruling with respect to the independent fiduciaries' motion to compel United to make the minimum funding contributions, which was also a motion to force us to comply with alleged CBA obligations or 1113(f), what Your Honor ruled there was that 1113(f) does not create any superpriority; all it does is have a contractual obligation.

Whatever rights to payment in terms of priority or timing are left to other provisions of the code, whether it be 507 or 503. And so I don't believe the fact that this is a motion for enforcement of 1113 obligates us to make the payment now.

Your Honor can enter your order. And if Your Honor does in fact do what Your Honor indicated you were going to do, then we can address this at another time. But that's the ruling that Your Honor made with respect to the minimum funding contributions and alleged 1113 obligation. And I don't think that the court should take a different view now.

MS. CECCOTTI: Your Honor, if I might just quickly, for the Air Line Pilots Association. We also think that this is a motion very much akin to [5] the motion that

we brought in February. And on that basis, I would distinguish the order that Mr. Seligman has just referenced.

THE COURT: Yes. The basis for that ruling was that this effectively is a request to enforce a postpetition agreement that the debtor entered into, settlement agreement that the debtor entered into, that required the payment of these funds to the retirees pending termination of the underlying pension plan.

MR. SELIGMAN: Well, I would say, Your Honor, whether it is – the concept of 1113 doesn't distinguish between prepetition or postpetition agreements. So whether it is a pre or postpetition agreement – postpetition agreement, that shouldn't make a difference. If it's an obligation under 1113, apparently, then the priorities of payment can't be altered from what they would otherwise be under 503 or 507.

MS. CECCOTTI: Your Honor, again –

THE COURT: Excuse me, Ms. Ceccotti. What distinguishes this from the situation that I ruled on earlier? Only the fact that I've announced orally a ruling on the termination of the pension plan?

[6] MR. SELIGMAN: Yes.

THE COURT: If you thought I was wrong in February or whenever I ruled on this issue, the same issue when it came up before, Mr. Seligman, I think it would have been appropriate to take some kind of appeal then, and maybe your position as a legal matter would have prevailed; the argument being that there is no reason to require payment here; that this is simply an unsecured claim that ought to be treated like any other unsecured claim, accorded whatever priority the code establishes for

it, but not given any kind of superpriority by virtue of an order of immediate payment. But you didn't take any appeal then.

MR. SELIGMAN: Your Honor, I don't think the fact that we didn't take an appeal – if Your Honor ruled against us, I don't think that we should – I don't think that we should be additionally prejudiced because we happened to determine not to take an appeal.

THE COURT: No, but the reason I say that is that that is in a sense law of the case. I am being asked to simply apply the same ruling that I applied then. And you're basically making the same argument you made then.

[7] MR. SELIGMAN: Well, you're right, Your Honor. But again, the distinguishing feature is that Your Honor has indicated – Your Honor made a ruling. You haven't entered an order. And I just think that as a matter of equity in this case and treating people similarly, I don't think it is appropriate just because Your Honor wants to take the time to enter a well-reasoned opinion that the estate should have to pay additional money to one group that's going to result in them getting preferred over somebody else, especially given the fact that this was set as a termination date. Your Honor ruled December 30th. And they've gotten paid $54 million more than they would have otherwise gotten paid had the matter been determined at that time.

THE COURT: I understand completely the, I almost want to say, emotional impact of the argument that you're making. At a kind of gut level, fairness level, it makes a great deal of sense. But as a matter of law, I don't

see anything that distinguishes this situation from the situation that I ruled on earlier.

And as a matter of law, the argument you're making now is that same argument that you made before. I don't think it is a matter that is [8] entrusted to some kind of broad discretion of the court. There is either the obligation to make this payment or not.

I ruled previously that there was an obligation to make the payment. That ruling was not appealed. It remains, I believe, law of the case. It is the same situation with the same parties. The intervening hearing and oral preliminary determination that I announced in court really doesn't change the underlying legal situation.

MR. SELIGMAN: Your Honor, if I could make one – I'll give you another legal point that perhaps you can take into consideration.

The motion that was brought in February was a motion brought by both ALPA and the retired pilots to enforce an obligation, a contract between United and ALPA. The retired pilots were not part of that agreement. In fact, that very agreement was objected to and is still appealed by the retired pilots.

It was an argument. If Your Honor recalls, Ms. Ceccotti stood up here and made her argument and Your Honor accepted her argument. But that was a contract between United and ALPA for ALPA's benefits. And Your Honor ruled that we had an [9] obligation to make the payment. I would submit that if Your Honor is going to take a look at that contractual obligation and look at it as a postpetition contract, it is a contract between United and

ALPA. And then let's look at what are the obligations that perhaps United has to ALPA under this agreement.

The obligation running to ALPA is with respect to – if you look at ALPA's motion, it talks – in its joint motion, it talks about that we owe some lump sum obligation payments to retiring pilots, retiring pilots who are still represented by ALPA because they are active employees. That's one issue.

The second issue is the issue of making nonqualified payments to retired pilots who are not represented by ALPA. And, as a matter of fact, ALPA throughout this case has stated that they don't represent the retired pilots. In 1114 they stated that they didn't represent the pilots. So it's a question of who represents the retired pilots. URPBPA in this case. That agreement between United and ALPA was not negotiated with URPBPA. It didn't involve URPBPA. URPBPA actually contested that agreement.

[10] And so we believe, Your Honor, if you were going to enforce that as a contractual matter, you should enforce the contractual obligations between United and ALPA for the benefit of the active retiring pilots to pay the lump payments, which I don't know the exact amounts, several hundred thousand. But the moment that they retire and they are out the door, they are no longer represented by ALPA and they shouldn't get the benefit.

As a matter of fact, and there's been – and Your Honor ruled in the 1113 process, URPBPA couldn't participate in the 1113 process because they weren't a party to the CBA, and they had no rights under the CBA. So I think if Your Honor was going to make a distinction there, that would

be the distinction and you should separate out the obligations to the active pilots versus the retired pilots.

THE COURT: Do you have anything to say in response to that?

MS. CECCOTTI: Yes, I do, Judge. I think that if Your Honor reviews the ruling from February, you will see that this was a matter of reading the language of Section 4 of the agreement, which is the language that is quoted in today's joint [11] motion. The language does not distinguish between the effect of the "shall not terminate" – the A plan language.

This not a representation question. There is no inconsistency really between ALPA's motion – it was ALPA's motion in February, I believe. URPBPA supported – may have joined, but it was our motion at that point. There is no representation question here. And the concept – the concepts are not inconsistent at all. ALPA is enforcing its letter agreement, its collective bargaining agreement.

The fact that some payments may go to retirees and some payments may go to actives doesn't change – absent any kind of distinction in the agreement itself, the operative language that we are dealing with here, and there is none, this is a matter of ALPA as the bargaining representative enforcing its agreement.

It is very different from the concept of ALPA's position negotiated on behalf of active employees, active pilots, excuse me, in representing the active pilots and not representing as a collective bargaining matter in the negotiations the retired pilots.

[12] THE COURT: All right. What I am going to do is to simply continue to apply the law that I announced

in February. Now, if you want to appeal this order, Mr. Seligman, I will allow you to do that by putting these funds in escrow so that they will be available to be paid to the retirees in the event that you are not successful in the appeal. I don't believe that that arrangement would cause irreparable injury. But if you do not choose to appeal this, then I am going to be consistent and you will be obligated to make the payments.

MR. CARRIGLIO: Thank you, Your Honor.

MR. SELIGMAN: Thank you, Your Honor.

THE COURT: The motion is granted.

You know, I want to give you an opportunity, Mr. Seligman, to determine whether you want to appeal it, and so I will make this order effective the close of business tomorrow.

MR. SELIGMAN: Thank you.

Your Honor, one other thing that I want to just bring to your attention. We are actually going to file this with chambers as a courtesy copy. With respect to the actual order itself, we thought it was appropriate just to tender to Your Honor – there is certain language that is [13] standard in an order terminating a plan –

THE COURT: If you want to propose a draft order in conjunction with the underlying question of plan termination, you can certainly do that.

MR. SELIGMAN: That's fine. We just want to make sure, if Your Honor does enter the order, that it has the magical language.

THE COURT: Sure. You can tender a draft order to chambers. There is no problem with that.

MR. SELIGMAN: We will submit it this afternoon.

THE COURT: Given that I'm leaving later today, I would like a draft order granting this motion given to me today. Again, it would be effective 5:00 p.m. tomorrow.

MR. CARRIGLIO: Yes, sir.

THE COURT: I want the draft order prepared now.

MR. CARRIGLIO: That's what we will do right now, Judge.

THE COURT: Thank you.

MR. SELIGMAN: And we'll submit that other order to chambers.

[14] THE COURT: Whenever you prefer.

MR. SELIGMAN: Thank you, Your Honor.

(Which were all the proceedings had in the above-entitled cause, October 6, 2005, 9:30 a.m.)

I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	**Chapter 11**
UAL CORPORATION, ET AL.,	)	**Case No. 02 B 48191**
	)	**(Jointly Administered)**
Debtors.	)	

ORDER GRANTING THE EMERGENCY MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL PURSUANT TO 11 U.S.C. SECTION 1113(f) TO COMPEL CONTINUED PAYMENT OF NON-QUALIFIED PENSION BENEFITS UNDER THE PILOTS' COLLECTIVE BARGAINING AGREEMENT

The Emergency Motion of Air Line Pilots Association, International pursuant to 11 U.S.C. Section 1113(f) to Compel Continued Payment of Non-Qualified Pension Benefits under the Pilots' Collective Bargaining Agreement came before the Court on February 18, 2005. Upon consideration of the undisputed facts, the arguments of the parties and the applicable law, and for the reasons set forth on the record in open court,

IT IS HEREBY ORDERED that:

1. The motion is GRANTED.

2. Debtors shall continue payment of non-qualified benefits (as described in the motion) until the A Plan is terminated pursuant to applicable law or the parties agree otherwise.

3. Notwithstanding the possible applicability of Bankruptcy Rule 7062 or any other rule that would provide for a stay, the terms of this Order shall be immediately effective and enforceable upon its entry.

Dated: February 18, 2005 /s/ Eugene R. Wedoff
Eugene R. Wedoff
United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	No. 02 B 48191
UAL CORPORATION, et al.,	)	Chicago, Illinois
	)	February 18, 2005
Debtors.	)	9:30 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

* * *

[64] MR. SLATER: Thank you, Your Honor.

THE COURT: I think it might be appropriate to take a five-minute recess at this point.

(Brief recess.)

MR. SELIGMAN: Good morning, Your Honor. David Seligman on behalf of the debtors.

MR. CARRIGLIO: Good morning, Your Honor. Jack Carriglio on behalf of the retired pilots.

MS. CECCOTTI: Good morning, Judge. Babette Ceccotti on behalf of the Air Line Pilots Association.

MR. MENKE: John Menke, Your Honor, for the Pension Benefit Guaranty Corporation.

MR. NEWMAN: Good morning, Your Honor. Eric Newman also on behalf of the retired pilots.

THE COURT: It would be most helpful for me in considering all of these related matters that are next on the agenda to hear from Mr. Menke as to what he understands

the effect of a retroactive termination of a defined benefit pension plan to be.

MR. MENKE: Wow, that's quite a question, Your Honor. I'm not quite sure how it applies in this context.

THE COURT: Well, the PBGC in the pending [65] complaint for termination of the ALPA pension – or the pension plan that ALPA members are participants in, has asked that the termination be effective as of a particular date in the past, correct?

MR. MENKE: Well, no, not exactly, Your Honor. We – and you're going to have to forgive me, Your Honor, if I get these dates wrong by a day or two because we've been a bit removed from it now.

It is my recollection that PBGC filed this complaint in the federal district court here on December the 30th, 2004, requesting that the pilots' plan be terminated that same day, on December 30th.

THE COURT: Yes.

MR. MENKE: In addition, on December 30th, the agency caused to be placed in newspapers around the country a legal notice intended to give the pilot participants in the pension plan constructive notice of its intent to terminate the plan that is required by Section 4042 of ERISA.

So strictly speaking, we're not asking for a retroactive termination. It's retroactive as of today, I suppose.

THE COURT: That's exactly what –

MR. MENKE: But it's not retroactive as of the time when we initiated the process.

[66] THE COURT: All right. But we're really quibbling over terms because certainly at the time it was filed and you asked for immediate termination –

MR. MENKE: That's correct.

THE COURT: – you would have known that immediate termination wasn't going to take place because there would be an opportunity for other parties to –

MR. MENKE: That's certainly true.

THE COURT: – participate in the proceeding.

MR. MENKE: Certainly true.

THE COURT: So in asking for immediate termination, termination effective as of the date you filed the complaint, you were even then looking to have an order entered that would have a retroactive effect.

MR. MENKE: Strictly speaking, that would be correct. Just generally, we are asking for a termination of the pension plan and a setting of the termination date as of the date we filed our complaint, and notice was given to the participants of December 30th.

THE COURT: Okay. So I think now we've [67] gotten to the point where you can –

MR. MENKE: Okay.

THE COURT: – answer my initial question. What is the effect of having a termination date in the past?

MR. MENKE: The effect of any termination date, whether it be in the past or in the future, is to essentially halt the operations of the plan, transfer administration of the plan from the PBGC – or from the company to PBGC. That obviously will now occur in the future whenever it is finally resolved.

From the participants' point of view, benefits, additional benefits, will stop accruing as of December 30th. Their benefit –

THE COURT: Well, additional benefits will stop accruing as of December 30.

MR. MENKE: That's correct.

THE COURT: But to the extent they've already been paid, what's the effect?

MR. MENKE: To the extent participants have received payments in January now, and February and March, et cetera, that would be in excess of what they would be entitled to receive as guaranteed benefits from the PBGC, plus – what they would be [68] entitled to receive after termination PBGC will assert on behalf of the plan a claim for the excess amount. Pursuant to our regulations, the participant can either repay that amount, the excess benefits they received, to the agency in a lump sum, or, more commonly, there is a reduction, usually slight, and we hope slight in this case because we hope this happens fairly quickly, a slight reduction in their benefit payments going forward so that that overpayment can be recouped over that participant's lifetime.

THE COURT: Okay. That really is what I needed to know. I think that's very helpful in understanding what's going on here. So that if United were to make

payments now that the PBGC later recouped from the participants, the effect would be a transfer of United's funds to the PBGC.

MR. MENKE: No. that's not right, Your Honor, because even now, to the extent that benefit payments are being paid to the participants, they are being paid out of the trust fund monies held by the plan. United is not, unless this particular unusual circumstance –

THE COURT: Okay. But if we're talking –

(Simultaneous colloquy.)

[69] MR. MENKE: – paying benefits with its money.

THE COURT: Okay. If we're talking about nonqualified payments, and that's what's in dispute now to a large extent – well, PBGC wouldn't be recovering those.

MR. MENKE: To the extent we're talking about the nonqualified plans, which I know is another issue up here today, we are not involved in that process at all.

THE COURT: And payments made under the nonqualified plans would not be something that you would be recouping, obviously.

MR. MENKE: It's not something we would be recouping. It's not something we, quite frankly, have anything to do with, Your Honor.

THE COURT: Okay. Fine. That's very helpful. Thank you very much.

All right. Well, let's try to take these to some extent in order. The first items I have on the agenda here deal with the status of the complaint that was filed in the district court, has been determined to be within the scope of the district court's internal operating procedure requiring reference to this court, and it is now at [70] least temporarily pending before this court.

I understand that there is a motion for reconsideration that's pending in the district court at this point?

MR. MENKE: That's correct, Your Honor. There was a brief argument that Mr. Seligman and I participated in yesterday morning, and Judge Lefkow took that under advisement.

THE COURT: Is it the parties' preference that while the case is here I rule on matters that may arise under the case, or is it your preference that we wait to see what Judge Lefkow does with the motion for reconsideration?

MR. MENKE: Well, I can only speak for PBGC, obviously, Your Honor. It is PBGC's desire that this termination move as expeditiously as possible for reasons, including the reasons we've already talked about, we don't want to pile up a lot of nonqualified – a lot of benefits that PBGC may have to recoup if, in fact, this plan is terminated as of December 30th.

So it would be PBGC's hope and expectation that we would plow ahead. We would hope to plow ahead expeditiously in such a way as this can be dealt with before it gets, for lack of a more [71] effective legal term, mixed up with the 1113 and distress termination process, which is also plowing along at a fairly rapid pace.

THE COURT: Well, I would expect that if the case stays here it would, in fact, get mixed up with that since the issues are going to be largely the same, aren't they?

MR. MENKE: Well, in fact, Your Honor, the issues are not the same. In fact, the issues have absolutely nothing to do one with the other.

THE COURT: Okay. Well, explain that, because it's hard for me to see how that would be the case.

MR. MENKE: With respect to the action that PBGC brought, PBGC brought that action seeking the termination of the pilots' plan to protect the pension insurance system. We believe that it was necessary to do that to avoid continuing to pile up liabilities that our agency would otherwise be required to pay.

THE COURT: The idea being that the payment of benefits under the plan that's now in effect was depleting that plan to the extent that when the PBGC took over that plan, it would have less money available to it and, therefore, make a [72] greater claim on the funds of the United States?

MR. MENKE: That's correct. That's one of the components. Another component was that as long as the plan was not terminated, participants were accruing additional benefits in that plan that we would have – that we would be obliged to pay.

In addition, the amount of the PBGC's guarantee jumps up every January, and that as well would increase the amount that our agency would be liable to pay.

THE COURT: And the condition of the debtor financially, its ability to fund the plan adequately, is irrelevant to the considerations that you're talking about?

MR. MENKE: Precisely, Your Honor. The law is absolutely clear that when PBGC steps in to involuntarily terminate the plan under Section 1342, the only interests that matter are the interests of the participants in receiving proper notice of that, we think we'll show that in the administrative record, and the interest of the PBGC.

The law is clear, and courts have clearly interpreted the law, that the interests of the debtor are entirely irrelevant.

THE COURT: Well, it would be the [73] interests of the plan participants that I would think would be relevant. And what I was assuming, perhaps completely erroneously, is that the plan participants might argue that it would be better to require the plan sponsor to make additional contributions to the plan as opposed to having the PBGC terminated.

MR. MENKE: Well, I don't know what the participants are going to argue. It is the case that no legal contributions are due to the pilots' plan at the moment, and it's my understanding won't be until October, I believe, is the first required payment into the pilots' plan. Contributions are due to other plans, but not to the pilots' plan.

THE COURT: Okay. That's very helpful, Thank you.

Ms. Ceccotti.

MS. CECCOTTI: Your Honor, I'm going to speak, once again, not having our motion to intervene granted, but just to make a couple of comments because it does bear on Mr. Menke's comments about the scheduling.

I knows it's the PBGC's hope to have the case, in fact, scheduled in a concrete manner perhaps as early as today. And what I've told [74] Mr. Menke is just, simply because I haven't had a chance to really review that issue with my client yet, it's difficult for me to actually agree to any dates.

But I do want to comment, though, on the exchange with respect to the standard under 4042. It is true that the focus of the standard is the long – at least the element of the standard that the PBGC has cited here, which is the long-run loss to the program, the PBGC standard, is different from the standard under 4041 where the focus is the financial condition of the debtor.

However, we have not seen the administrative record yet. We've had some conversations, and we believe that it's in the process of being finalized to be turned over to the parties, and I wouldn't want to formulate or at least express too complete a conclusion having seen the administrative record. But the circumstances of the timing of the filing of the complaint and the selection of the date right in the midst of the process by which the ALPA agreement was being approved, the PBGC's stated unhappiness with that agreement, leads me to at least have to preliminarily consider the possibility that there [75] may be an interpretation of the long-run law standard that may not be limited only to the pilots' plan. It may have to do with whether terminating the pilots' plan would, in fact, in the PBGC's mind have an impact on their position with regard

to the other three plans. Again, we don't know. It's very early days here. I don't want to again prejudge anything before we've seen the record.

But in terms of Your Honor's comments about whether the matters are related, I guess I would have to agree that there may be – it may well be that they're related because if there is an interpretation of that aspect of the statute that is related to the distress termination motion that the debtor is anticipating filing in April, then it may well be that the matters are very much related.

Again, we don't know yet, but I did want to at least alert the court to the possibility that we have very much considered that possibility in light of the circumstances, uninformed again by the record, but that precipitated the filing of the complaint.

THE COURT: When is it anticipated that Judge Lefkow might rule on the motion for reconsideration?

[76] MR. SELIGMAN: Your Honor, David Seligman again. I don't know that – it's hard for me to speculate. I could at least say this –

THE COURT: Does she have a status date set?

MR. SELIGMAN: No, because what happened – the way that the argument went was – I obviously took the position that the motion to reconsider should be denied. And what she said was – and I said, "Do you want the debtors to submit briefs to that effect?"

And she says, "No, don't submit anything to me yet. I will look at the papers. If I need something from you, I will let you know."

I will say at least from the bench she did say that she – you know, she didn't think she was likely to change her view, but that's a different issue. So there is no status set. There is not even a – we're just waiting to –

THE COURT: All right.

MR. SELIGMAN: – see if she wants additional papers from the debtor.

THE COURT: What's your position as far as what ought to be done at this point?

MR. SELIGMAN: I don't think – I would [77] agree with Mr. Menke that – I don't want to suggest that this thing should be put on hold just while we're waiting for Judge Lefkow's reconsideration. I think that we can go forward however it's scheduled.

THE COURT: Okay.

MR. SELIGMAN: I also –

THE COURT: But that's the main point I wanted to get out.

Mr. Carriglio, what's your view?

MR. CARRIGLIO: Yes, Judge. Our view is that it is related to the distress termination action. In fact, I'll go one step further than Ms. Ceccotti. We believe the PBGC's action was not taken in good faith. There are cases that allow for a participant, or the representatives of a participant, to bring up the lack of good faith by the PBGC, and we do intend to do that in this case.

We do intend to show that the PBGC found that the pilot plan was affordable, that it was not underfunded,

and that their action to seek termination of the plan was done only after they saw the ALPA agreement and became outraged as to the proceeds that ALPA is going to get out of United at the conclusion of this bankruptcy.

THE COURT: Okay.

[78] MR. CARRIGLIO: So we –

THE COURT: I think I know enough now to make some decision as to how we ought to proceed here.

First of all, are there pending motions to intervene in this case?

MR. CARRIGLIO: Yes, there are. We have –

THE COURT: Are they opposed?

MS. CECCOTTI: No.

MR. SELIGMAN: Your Honor, the debtors do not oppose ALPA's. The debtors also do not oppose the retired pilots' motion to intervene as defendant to defend this complaint. They did include counterclaims.

THE COURT: Well, you can move to dismiss those in the ordinary course if you think they're inappropriate. The important thing, I think, is that the motion to intervene will be granted, and I think appropriately so. Obviously both ALPA and the retired pilots have interests here that would be affected by the outcome of this complaint, and so the intervention motions will be allowed.

I think what needs to happen then is that this matter needs to be set for a pre-trial [79] conference. And in the pre-trial conference, using the usual form, I can find out what issues are in dispute, how much discovery might be

appropriate, and whether there are legal questions that need to be resolved perhaps by briefing prior to any trial that would take place in this matter.

I think that this is an important issue to have resolved as quickly as possible, so I would like to have the pre-trial conference relatively soon. Now, it may be that at the pre-trial conference a determination is made that this needs to be coordinated with the distress termination proceedings, but I'm going to leave that as an open question right now. I haven't had the opportunity to review this in any great detail, and you haven't had the opportunity to present a complete response, particularly, as Ms. Ceccotti says, you haven't even been able to look at the administrative record yet.

So what I would be inclined to do is go three weeks or so before this pre-trial conference to give the parties an opportunity to at least state their position. Discovery can take place in the meantime. I'll simply need a statement of what your position is as of the time you submit [80] the pre-trial statement. And we need to look at the calendar to see if we can get a date that will work.

MR. SELIGMAN: Your Honor, in the scheduling that, I do think it would be important if we could just know the date that we're going to get the administrative records so that we have that opportunity.

THE COURT: Do you know that, Mr. Menke?

MR. MENKE: I have recently been in communication with my office, particularly with the person who is charged with preparing that, and the current estimate is that it will be completed by the end of next week. We hope to have it done Friday to deliver to the parties on Saturday

or Monday, whichever they would prefer. That's not an absolute promise, but we believe that that is – that that is certainly the goal we are shooting for and certainly expect to make that.

THE COURT: All right. Well, even with some slippage in that, a date three weeks from now should work.

This doesn't work for my schedule. I think the best time to do this would be at 9:00 o'clock on March 8, which squeezes you a little bit, but it's the best date that I can give you.

[81] MR. CARRIGLIO: I'm sorry, Judge. We would get the record that Monday? Is that . . .

MR. MENKE: It's my – I believe the current estimate of when the record will be completed and ready to be provided by the parties is this coming Friday, the 25th –

MR. CARRIGLIO: Oh, I'm sorry.

THE COURT: Yeah, there is plenty –

MR. MENKE: – of February –

THE COURT: – of time before the –

MR. MENKE: – with delivery on Monday the 28th or Saturday the –

THE COURT: That's fine.

MR. MENKE: – the 26th, whichever folks would prefer.

THE COURT: Okay.

MR. CARRIGLIO: That's fine.

THE COURT: Ms. Williams will get you the pre-trial form, if it's not available right now. In any event, the pre-trial conference itself will be at 9:00 a.m. on March 8. The date for the submission of the joint pre-trial statement will be March 7 at noon so that I have an opportunity to read it prior to the pre-trial. And the parties will be directed to consult together regarding the [82] preparation of the joint pretrial statement on no later than March 2. You've got as your dates March 2, March 7, and March 8 at 9:00 a.m.

And I believe there was an objection by United to the retired pilots' intervention based on the content of the complaint. I think that's premature. If there is a desire to move to dismiss, that can be done at whatever point it seems appropriate. I would suggest that that be something that's discussed at the pre-trial conference. The parties' positions with respect to that can be incorporated in the joint pretrial statement.

I believe that that resolves the matters in connection with the complaint for termination of this pension plan. Are there any other matters that we need to discuss in that connection?

MS. CECCOTTI: Just with respect to the orders granting, or at least with respect to ALPA, I have a draft order that has the adversary caption. Would you prefer that I hand that up now or submit it –

THE COURT: Well, if it's been reviewed by the other parties –

MS. CECCOTTI: Yes.

[83] THE COURT: – and they have no objection to the form, I'd be happy to have it entered right now.

MS. CECCOTTI: Your Honor, I didn't select as between Rule 24(a) and 24(b), however.

THE COURT: Well, I have no particular preference.

MS. CECCOTTI: Okay. That's fine. I think we'll leave it at 24(b) because I think Mr. Menke and I probably would agree on that one.

THE COURT: That's fine.

MR. MENKE: That's right, Your Honor.

MR. CARRIGLIO: And we'll provide you with a similar order on that, Judge.

MS. CECCOTTI: In fact, Judge, why don't I make that one change and then we'll have it submitted to your office.

THE COURT: You can do that in handwriting if you'd like, Ms. Ceccotti. I have no problem with your doing it that way.

And, Mr. Carriglio, you can submit your order by Thursday of next week at 9:30.

MR. CARRIGLIO: Thank you, Your Honor.

THE COURT: At that point we need to move to item 25 on the agenda, the emergency motion of [84] ALPA to compel continued payments of the nonqualified benefits.

Ms. Ceccotti, the major question here is whether I ought to delay ruling on this motion until after the completion of the arbitration proceedings that the parties have already commenced, and I think that's a critical question. If my memory is correct, I entered an order granting relief

from the automatic stay to allow for arbitration proceedings of this sort arising under the collective bargaining agreements to which the debtors are parties, correct?

MS. CECCOTTI: Yes, Your Honor, that is correct. And anticipating that that would be the very first question that Your Honor asked, I'm perfectly happy to assure you that you need not defer to the arbitration, and here's why. Normally, yes. The standard would be that if you have a dispute arising under the collective bargaining agreement where each side is raising interpretive questions, the proper course of action would certainly be to defer that process to, in this case, the System Board of Adjustment.

We have, in fact, commenced a grievance. The explanation regarding the [85] notification that the company made on February 3rd was really not terribly detailed. So, of course, viewing the notification in the proposed action as a violation of the agreement, ALPA did commence the arbitration process. The first step grievance process hearing, if you will, has already taken place, but there has been no decision yet by United. So we are still not crystal clear on the companies' – what the company is going to say about that as a matter of interpretation of the contract.

However, I have to note that in the filings that were made yesterday, the memo and the filings that we received yesterday, we really didn't have a statement that I would consider to be arguably justifiable as a matter of contract interpretation by the debtor. What we have instead is an issue that really has to do with notions of bankruptcy law to the extent it involves whether the debtor can simply cease payment on what they now determine to be a prepetition claim. So –

THE COURT: Okay. So I think what your argument then is is that if there were a colorable claim that a debtor/employer under a collective bargaining agreement had for action that it took under that agreement, it would be a proper subject [86] for arbitration under the agreement, but that if there was no colorable basis for the contention that the collective bargaining agreement permitted the conduct, it could only be seen as a unilateral modification prohibited by Section 1113 of the Code.

MS. CECCOTTI: That's correct, that's correct. And, really, based on what we've seen, we really haven't seen, I think the words of the Conrail case is "an arguably justifiable," but "colorable" would be the same thing. The dispute, the justification at issue, would have to be something that the company in this case would raise as an interpretive matter. And as far as I can tell, they haven't done that. So I think it would be our position that Your Honor could proceed directly to the statutory question under Section 1113(f).

THE COURT: Okay. Let me hear from Mr. Seligman, if he's going to be arguing that point, as to why there is a colorable claim that this is permitted under the collective bargaining agreement.

MR. SELIGMAN: Our basis for that is is that the – this is the intervention – the intervening PBGC involuntary complaint is certainly [87] something certainly that, you know, when the '91 letter agreement was entered into creating these nonqualified benefits certainly nobody ever contemplated at that time.

And our position is this: The – our payments of the nonqualified benefits are going to cease as of the effective date of the termination of the pension plan.

THE COURT: Yeah, I read this in your reply brief or your response to the motion. What I want to know is where is there is a colorable interpretation of the terms of the collective bargaining agreement as modified by this letter that would justify nonpayment of the nonqualified pension benefits.

MR. SELIGMAN: The basis is is that our obligation to pay. And it's not actually even a bankruptcy matter because the involuntary could actually come up if we were outside of bankruptcy as well. And our view is is that if our obligation to pay these benefits ceases as of the effective date of the plan, our temporary suspension of these benefits to make our payments consistent with that obligation justifies an interpretive matter under the document in question.

[88] The document in question, it just says – it's a '91 letter agreement that we attached to our papers. It basically says that United shall provide a program to pay nonqualified benefits that reflect the difference between what retired pilots would get under the qualified plan with and without the limitations imposed under the Internal Revenue Code. And our view is is that since the qualified benefits go away when that plan – as of the date that that plan is terminated, we are justified under that document to not pay more than we would otherwise pay.

THE COURT: Okay. The discussion that I had with Mr. Menke earlier is very helpful here, I think. The impact of a retroactive or past date termination for purposes of the PBGC is that it defines the right of the PBGC

to recoup payments that may have been made from the time that the termination becomes effective until the time that the order terminating is actually entered. I don't know that there is any – and that would be presumably pursuant to the law that governs the actions of the PBGC.

I don't know of any similar provisions in the agreement with the pilots union that would [89] give United any right to recoup, any right to engage in retroactive adjustments of the benefits that it's made. So what relevance does that have?

You are undoubtedly correct, the right of the pilots to receive nonqualified benefits becomes meaningless if there is no plan that those benefits can be compared to. It becomes a nonissue. There is no basis for computing the nonqualified benefits. So on a going-forward basis, your argument makes perfectly good sense.

But I don't see how the right of the PBGC to engage in recoupment based on a prior date for termination of the plan in any way affects United's obligations to the union members on a current basis.

MR. SELIGMAN: And I'm not suggesting that the PBGCs rights to recoup or to offset in their administration of a terminated qualified plan has any – their right has any effect on what we're doing. What we're saying is is that if Your Honor were to today rule on the involuntary complaint, if Your Honor were to say today, "I'm going to just hear this matter on an expedited basis, I'm going to grant judgment in the favor of the PBGC," and even if Your Honor said, "and I'm going to set today as [90] the termination date," our obligation to pay nonqualified benefits would cease.

And so we're saying as a contractual matter, given this one-and-a-half page letter agreement entered into 15 years ago, which certainly never contemplated this situation, we shouldn't be in a position where just because of the passage of time, it may take three months or two months, whatever it is, to rule on the involuntary, or that Your Honor, when we have the May trial on the 1113 pension termination matter, if Your Honor rules on it in that time frame, that we should be in a position as a contractual matter to pay more than we would otherwise pay, because, again, if the termination date was set today even, for instance, we wouldn't have any obligation to pay anymore.

And we should just not be in a position where, as a result of the passage of time for the next two or three months for this litigation, the plaintiffs, these five retired pilots at issue, should get a windfall and get more than they would get if we, in essence, compressed time on the litigation.

THE COURT: If the termination had taken place the day this bankruptcy was filed, there would [91] be a different situation as well, but it didn't. If it took place two months ago, we would be in a different situation, but it didn't. You need to point me to some kind of a reasonable interpretation of the contract that says the potential for a termination in the future allows the debtor to cease making payments now in anticipation of that future event.

MR. SELIGMAN: The document doesn't say that. All the document says is is that we have an obligation to create a program to –

THE COURT: Yes. The potential for termination, which may never have been considered in 1991, I expect that's right, generates the potential for a cessation of United's obligation to make nonqualified benefit payments upon termination. But I don't see how it could conceivably be read to give United an opportunity to cease making benefit payments prior to termination. I really do believe that that's an argument that has no colorable basis in the collective bargaining agreement.

MR. SELIGMAN: Well, Your Honor, that is putting us in a position where we're going to have to pay out monies that we may not otherwise be – have to pay if this litigation was heard today or [92] tomorrow.

THE COURT: Sure, but that's always the case. As I said, you've already paid out money that you wouldn't have paid had the termination occurred earlier. But the theory that you have for ceasing the payments is that the plan has terminated. It hasn't terminated. This idea of a retroactive termination date, as we just discussed with Mr. Menke, is relevant to the PBGC's ability to recoup payments that have been made pursuant to regulations that are applicable to the qualified plan.

It in no way is parallel to any provision in the collective bargaining agreement that gives United a right to recoup payments that are made in the event that a retroactive termination has occurred. As you said, that doesn't – that wasn't in any way in the contemplation of the parties.

You have an argument, I think it's a good argument, that once the qualified plan is terminated, the obligation to make nonqualified payments under the collective bargaining agreement will necessarily terminate because

there is a computation that has to take place based on the [93] qualified plan to calculate the nonqualified benefits. But until that termination occurs, there is an ongoing contractual obligation to make the nonqualified plan payments. There is nothing that erases that obligation because of a potential for an event taking place in the future.

And as you said, there is no contractual language that would support that, number one. Number two, there is contractual obligation imposing a current obligation to make the payments.

MR. SELIGMAN: Well –

THE COURT: So I really do believe Ms. Ceccotti is right in saying that this is an argument that has no colorable basis.

MR. SELIGMAN: I would just like to point out, Your Honor, that the setting of a termination date, it does more than allow the PBGC to recoup. There is a whole bunch of calculations that go on as a result of the effective date.

THE COURT: That impact the payments and the rights of the parties to the qualified pension plan. They have no impact whatever on the rights, unless it's just created, of the rights of participants to receive nonqualified plan payments.

MR. SELIGMAN: But, Your Honor, maybe I [94] didn't make myself clear. The payments of the nonqualified benefits are linked to the qualified benefits.

THE COURT: Yes, I understand that. But I think all we can do is repeat one another at this point. And I will do one more repetition, but –

MR. SELIGMAN: I don't even think it's –

THE COURT: It's not necessary. Fine. Okay. That leaves us then with this – so I think I will conclude that under 1113 there has been an – it hasn't taken place yet, obviously, since it was prospective. But had United taken the position that it is not obligated to honor the collective bargaining agreement's requirement to make nonqualified pension payments as of March 1st, it would have engaged in a unilateral modification of the collective bargaining agreement in violation of Section 1113.

I think that then requires us to go to the next issue, which is whether United would be entitled, in the face of a binding collective bargaining agreement requiring the payments, not to make the payments because they would not constitute administrative claims or would otherwise be subject to some kind of bankruptcy-imposed limitation.

[95] Ms. Ceccotti, do you want to address that?

MS. CECCOTTI: Certainly, Your Honor. And our answer would be that the attempt to characterize these claims now as pre-petition claims as a defense to 1113(f) really does not have any merit at least under the circumstances of this case. The 1113(f), we'll call them the super-priority payment cases, I guess, for lack of a better phrase, there are really two theories that the courts employ.

One is the – generated by the Unimet case in the Sixth Circuit in which the court takes a very literal reading of Section 1113(f). Your Honor, I didn't cite Unimet. I'm sorry. We actually didn't file a written reply because we

got the papers yesterday. I can probably dig out the Unimet cite without too much trouble if the court needs it.

THE COURT: You don't need to do that.

MS. CECCOTTI: Okay.

THE COURT: What court issued the decision?

MS. CECCOTTI: It would be the Sixth Circuit. And I believe it's 1989, although I may have to stand corrected. I might have it here. Oh, [96] I have it, Your Honor. I'm sorry. It's 842 F.2d 879, Sixth Circuit. Actually cert was denied in 1988.

THE COURT: Okay. I'll tell you what we're going to do about this in general, which is I'm going to hear your arguments now, get the cases you think I need to read, read them over the lunch break, and come back and hope to give you a ruling this afternoon. I think that the exigency of the circumstances, namely the need to either make payments or not make payments beginning March 1, precludes any taking under advisement and issuing of a ruling later. So I'll do the best I can to consider the arguments that have been made by the parties and give you a ruling today.

MS. CECCOTTI: Thank you.

THE COURT: This citation again was what?

MS. CECCOTTI: It's In re Unimet, U-n-i-m-e-t, Corp., 842 F.2d 879, and that's the Sixth Circuit. I'm going to guess it's also 1988 since I've only got one date here for the cert denied.

THE COURT: Okay. I will have no problem getting that.

MS. CECCOTTI: Okay. The Unimet case [97] really arose – Your Honor may notice that it has to do with 1114 – retiree health benefits. This is a pre-1114 case. Just so when Your Honor reads the case, it had to do with a company that had ceased operations, and the question came up as to whether collectively bargained retiree health benefits were required to be paid because of 1113(f). And the Sixth Circuit took a very plain reading view of 1113(f) and said, yes, these are collectively bargained payments, and, in effect, denoted them as being, in effect, in their own category, not necessarily administrative expenses in the normal, traditional way that the bankruptcy courts might think of it. That's really one interpretive school of thought. And there are some cases largely limited to the Sixth Circuit, but not entirely, that follow Unimet.

Other cases take a view that I think we discussed last summer, and that is the view that emanates from the Ionosphere Club decisions, and there are two. There is Ionosphere 1. That is the case that we discussed with Your Honor last summer in conjunction with the grievance – the order entered in connection with the grievances.

There is also Ionosphere 2, and I'll [98] give you that cite. It's 22 F.3d 403, the Second Circuit, 1994. And the standard is the same in both, so the latter one quotes the former.

And what the Ionosphere 2 decision says is that 1113(f), and the extent to which the – there is – there becomes an irreconcilable conflict between 1113(f) and another code provision, because, of course, 1113(f) reads that no other provision of Title 11 shall be interpreted to

alter the – to permit unilateral alteration of a collective bargaining agreement.

The Second Circuit says that the provision is circumstantial, situational, rather than code specific. So, in other words, there might be situations in which a particular code provision presents an irreconcilable conflict, and there might be situations in which one does not. And in the first Ionosphere decision, the one involving the arbitrations, the court actually found both, and said with respect to the grievance procedure there is an irreconcilable conflict because, in effect, the grievant or the union cannot bring an arbitration, and this would be a real arbitration with interpretive – interpreting the collective bargaining agreement, into bankruptcy court.

[99] And the Second Circuit said that in the absence of having the grievance and arbitration process considered without reference to the automatic stay, that that provision would, in effect, be lost in the contract, the grievance and arbitration process would be eliminated, and in effect unilaterally altered.

In the same case, though, the Second Circuit said that there was not an irreconcilable conflict with respect to a separate lawsuit that ALPA had filed seeking to enforce the term of the collective bargaining agreement. And so the Second Circuit's approach is less across the board, shall we say, than the Sixth Circuit approach. We believe –

THE COURT: Less protective collective bargaining agreements.

MS. CECCOTTI: Well, we would certainly make that argument, Judge. But lots of courts have picked up the Second Circuit's approach, except they don't do it in

the – with the same type of analysis. They don't really engage in the circumstantial and situational analysis.

They simply pick up on the holding of Ionosphere 2, which basically says that in that [100] case, because it involved unpaid vacation pay and other claims that Eastern Airlines had not paid ever in the course of the Chapter 11 case, and this was an attempt by the union in the context of a claims dispute involving unpaid claims, to, in effect, use 1113(f) to say that the failure to pay somehow unilaterally altered the collective bargaining agreement, and the Second Circuit there said no. And that is the section of Ionosphere 2 that lots of other courts have picked up and have basically taken similar – and they are really very factually similar, the cases.

And it said where you have a claims issue that arises because, for example, the employees were terminated prebankruptcy but they're still owed money, or there was a sale and there were still monies left over that the debtor had never paid, could the union come in and use 1113(f), in effect, as an overreading of Section 507. And the courts that employed this aspect of Ionosphere basically say, not uniformly, but by and large say no. And I'll get the case that we cited in our brief, Colorado Springs Symphony.

THE COURT; Excuse me for just a second, Ms. Ceccotti.

[101] Ms. Seligman and Mr. Carriglio, if you would be more comfortable sitting, this obviously is a little more extended than colloquy with the court generally is, I would probably feel more comfortable on your behalf.

MR. SELIGMAN: I'm comfortable standing. But if you would feel more comfortable with me sitting, I'm happy –

THE COURT: No, no, it's your choice, I'm just telling you the way I feel, if you're enjoying standing. I just notice you shifting from leg to leg, and I'm thinking that it might be more comfortable for you if you were sitting.

MR. SELIGMAN: Well, that's because I'm jumping to get in, but I'm happy to stand.

MR. CARRIGLIO: Judge, there have been a number of issues where Ms. Ceccotti and I have not been in agreement. On this one we are, so I'd like to stand as close to her as possible.

THE COURT: Your choice.

Go ahead, Ms. Ceccotti.

MS. CECCOTTI: Thank you.

So the debtor really has focused on the claim payment superpriority cases, and they've cited a number of them in the brief and their [102] responsive papers. And I think the factual circumstances are by and large as I've described to you. These are claims payment cases. We don't have that here. So in our view, the use of the no superpriority payment cases really doesn't apply and doesn't under either way – whichever school you end up with on the 1113(f) question really is not going to inform the issue that we have today.

And the reason is that the nonqualified benefits, as has been acknowledged, have been paid since the outset of the case. So we are not coming in all of a sudden 25

months into the case and looking for something and trying to use 1113(f) to get it paid. Instead, we have payments that have been made continuously. And, in fact, during the most recent Section 1113 process, of course, the primary focus of that process was the debtors' desire to eliminate its contractual obligations to continue the pension plans.

They're all in effect, the qualified plans are in effect. They're still paying the nonqualified benefit. And among the reasons for initiating the 1113 process was to discuss with the unions in an effort to reach a consensual agreement with respect to the debtors' desire to eliminate its [103] contractual obligation as a step towards a demonstration that it could meet the distress termination plan criteria under ERISA, and, of course, we ended up with the ALPA restructuring agreement, about which we spent considerable time last month.

The restructuring agreement deals specifically with the manner in which the parties addressed the debtors' desire to eliminate their contractual obligation to maintain the plan. And we've cited some of the provisions in our papers.

So that in addition to letter agreement 9212, which is still in existence, we have the manner in which ALPA and United, as expressed by, the agreement, have, I guess, memorialized their agreement, which will result in, if the debtors' file their distress termination motion on April 12th and proceed on May 11th to trial, ALPA has agreed that it will not press a contractual argument, that the termination of the plan would violate the collective bargaining agreement.

There is a provision that expressly says that between this period, and we've heard in another context about this

90-day period the parties are supposed to be engaging in, that the A plan [104] remains in full force and effect, and that the debtors' commitment is not to terminate the plan, except as the agreement allows, at least as between the parties, yes, we have this other intervening event here, but we're talking now about the debtors' obligation vis-a-vis ALPA, not to engage in a termination process that would, as a timing matter, take place before something the agreement calls the plan termination date in –

THE COURT: Okay. Does plan A include the nonqualified benefits?

MS. CECCOTTI: Well, Your Honor, I think as you pointed out in connection with the first part of this discussion, necessarily if you are terminating – not necessarily, but the contemplation would be that once the A plan is terminated, the qualified portion of the A plan is terminated and the PBGC rules take over with respect to guaranties and so forth –

THE COURT: Well, that's really not my question. What I want to know is just a matter of the use of terminology. Does the A plan equal a qualified plan or is there an A plan that includes both qualified and nonqualified components?

MS. CECCOTTI: Let me answer it this way: [105] There is a benefit determination that is made under the A plan. Its a final average earnings plan times years of service times a factor. You get to a number. The amount of that number that is over this IRS limit that you can pay from the qualified plan –

THE COURT: That's set out in the papers, and I saw that. What I'm unclear about is whether the A plan

dictates payment of nonqualified benefits or whether there is a separate B plan dealing with nonqualified benefits.

MS. CECCOTTI: Actually, there is a B plan, but its a completely different type of plan. It's called a directed account – a directed account plan.

THE COURT: That's what I needed to know. And the reason why I asked the question is the letter agreement that was approved by the court contains this agreement by United to continue making payments under the A plan.

MS. CECCOTTI: Correct.

THE COURT: And I want to find out if that A plan includes the nonqualified payments.

MS. CECCOTTI: Certainly in our view it does, yes.

[106] THE COURT: Okay. Now, I'll get Mr. Seligman's view on that question in a minute.

MS. CECCOTTI: Right. The reason that there isn't any mention, at least in Section 4 of the agreement in that regard, is because, as Mr. Menke would tell you, the B plan is not something that the PBGC – is not covered by the PBGC's termination insurance system. So in terms of these deliberately worked out portions of the agreement that have to do with the debtors' ability to seek a termination of the qualified plan, the reference in that section of the agreement is only to the A plan. Okay. So we never –

THE COURT: Look –

MS. CECCOTTI: Sorry.

THE COURT: – does the A plan include the nonqualified payments or not?

MS. CECCOTTI: I have to say for this purpose, yes.

THE COURT: Okay.

MS. CECCOTTI: For the purposes that we're talking about, yes.

THE COURT: Is there a document titled "A plan"?

MS. CECCOTTI: Well, that's a good [107] question, Your Honor. There are probably a number of documents titled the "A plan."

THE COURT: And they have different terms?

MS. CECCOTTI: Well, the A plan –

THE COURT: Is there more than one document currently effective that has – that's labeled "A plan" so that there is an ambiguity as to what's meant in the letter agreement that was approved by the court?

MS. CECCOTTI: No, I would hope that that is not the case, Judge. I guess my hesitancy only arises because we have the letter agreement which refers to both an A plan and a B plan in terms of the nonqualified benefit. So, in effect, you have nonqualified benefits tacking on to both the A plan and the B plan. Maybe that's the way to explain it.

THE COURT: Well, the benefits that you're seeking to have paid now include both?

MS. CECCOTTI: Yes – A plan only, not B plan.

THE COURT: All right.

MS. CECCOTTI: They haven't said they're going to suspend the B plan to our knowledge.

THE COURT: Just so that I'm clear now –

MS. CECCOTTI: Sorry.

[108] THE COURT: – if I assume that the debtor has a choice of making payments of nonqualified benefits that you're seeking to have paid now or not under Ionosphere and the cases that follow, but the debtor has agreed in a revision of its collective bargaining agreement pursuant to Section 1113 to make those payments, then your argument seems to me to be much stronger than it would be otherwise. And that's why I think this could be an important question.

MS. CECCOTTI: I'm sorry, Judge. I didn't mean to be ambiguous about it. In our view the language of the agreement that says that the A plan shall remain in full force and effect would include the qualified and nonqualified portion of the A plan benefits –

THE COURT: And that that includes the payments that you seek to have paid –

MS. CECCOTTI: Correct, yes.

THE COURT: – in March the way they've been paid –

MS. CECCOTTI: Yes, that's exactly right.

THE COURT: All right.

MS. CECCOTTI: I'm sorry for the confusion.

[109] In any event, because the – because of the circumstances, again, if we just go back to the way the Second Circuit thinks about this, because of the circumstances, there then becomes an irreconcilable conflict, again just using the Second Circuit's words, between 1113(f) in which the – which would require the continued payment under both 9112 and the restructuring agreement of the nonqualified portion of the benefit, and some notion, the automatic stay or maybe a Section 507 aspect or some way that the debtor is coming up with the notion that these are pre-petition claims, those two concepts are now in an irreconcilable conflict.

And we think that circumstantially then the notion that they somehow now cannot be paid because of the concept that they're pre-petition claims must fall in the face of the clear language of 1113(f). So that this is – this situation is in stark contrast to Ionosphere 2 and all of the other – all of the other types of cases where the debtors have simply not paid and the union is trying to come in and develop a means of getting that which was not paid paid.

THE COURT: Well, I take it in those other cases the debtors' position would have been [110] consistent through the case that payment of these particular sums, the ones that were in controversy, would have been inappropriate under the Bankruptcy Code.

MS. CECCOTTI: Yes.

THE COURT: That they would have been violating the priority scheme of the Bankruptcy Code had they made the payments.

MS. CECCOTTI: Yes. And, in fact, they routinely come up regarding topics like vacation pay or severance pay where there are court cases going back, you know, predating 1113 even about how those types of benefits get to be paid. So you have that element of the court decisions working into this.

THE COURT: Okay. Is there anything more you wanted to say about this issue?

MS. CECCOTTI: Yes. I wanted to just point out that the case that we cited, the Colorado Symphony case, actually takes a view that we think is consistent with, in effect, the manner in which the restructuring – in part at least in which the – the manner in which the restructuring agreement was brought before the court, which is as an agreement representing the compensation to which the pilots – the terms and conditions of pilots' [111] compensation that would be provided in consideration for the continuation of their services.

THE COURT: All right. As long as you've got that citation in front of you, why don't you give that to me as well.

MS. CECCOTTI: Almost in front of me, Judge. And here what the court says – I'm just flipping quickly to get it. It's 308 Bankruptcy Reporter 508. It's the Bankruptcy Court for the District of Colorado, 2004.

THE COURT: Okay.

MS. CECCOTTI: And here what the court says is that in the context of a labor agreement, the courts do not engage in this traditional analysis regarding administrative expenses and the two-part test to determine whether certain obligations meet the requirements for

payment strictly under Section 503, for example. Instead, if the employees are ready, willing, and able to provide the services, then what the court looks to is the compensation that's required by the labor agreement.

And I analogize this to the restructuring agreement situation, Judge, because when the restructuring agreement was brought to the [112] court, we had, as I'm sure you will recall, a number of objections on various grounds including –

THE COURT: This Colorado Symphony case would essentially disagree with the Ionosphere analysis, at least the Ionosphere analysis –

MS. CECCOTTI: Yes.

THE COURT: – as these other courts you mentioned have applied it.

MS. CECCOTTI: Yes. I think I mentioned that there is – the Ionosphere analysis wasn't uniform, and this is one of the courts that says –

THE COURT: Okay. So this really isn't something that's a new point. This is just something that goes back to the dichotomy you mentioned in the beginning between the Sixth Circuit in Unimet and the Second Circuit in Ionosphere.

MS. CECCOTTI: Yes.

THE COURT: And this Colorado Symphony case would be consistent with Unimet.

MS. CECCOTTI: It would be consistent – well, in Unimet there weren't any working employees, so I am not sure that it's entirely consistent with Unimet. I started

with that dichotomy because the debtors' cases – the cases that the debtor cited all are, as you might expect, of this Ionosphere 2 [113] type.

THE COURT: Okay.

MS. CECCOTTI: So I thought it would be useful to explain a little bit about the –

THE COURT: That's fine.

MS. CECCOTTI: – two approaches just so that we didn't –

THE COURT: Okay. Well, I'll certainly read the Colorado Symphony decision as well.

MS. CECCOTTI: Okay.

THE COURT: Anything else?

MS. CECCOTTI: Subject to anything I might disagree with that Mr. Seligman has to say, no.

THE COURT: Okay.

Mr. Carriglio, I take it that you agree with Ms. Ceccotti's argument?

MR. CARRIGLIO: Certainly, Judge.

THE COURT: Do you have anything you wanted to add to it?

MR. CARRIGLIO: If you look at the letter that United sent out to the participants –

THE CLERK: Microphone.

MR. CARRIGLIO: I'm sorry. If you just look at the letter that United sent to the participants explaining

why they wanted to terminate [114] nonqualified payments, they referred to the A plan. It's certainly in the context of the A plan –

THE COURT: Okay.

MR. CARRIGLIO: – Your Honor, and it's covered by that.

THE COURT: Thank you.

Okay. Mr. Seligman.

MR. SELIGMAN: Your Honor, a number of different points that I wanted to make here. The first thing I did want to mention was on the first day – we view these as pre-petition claims, and I'm going to get into the whole 1113 discussion in just a moment. I just did want to make clear that on the first day of this case we got authority to pay pre-petition claims in connection with our wages and benefits order, and that's been the basis upon which we've been paying these claims throughout the course of the case.

So it's not as though – I don't want to suggest that somehow our switching gears – we can't switch gears or we estopped somehow just because we've been paying them throughout the course of this case.

THE COURT: Well, the rationale for your 363 motion at the outset was that paying something [115] to the employees that might not be actually required and, therefore, outside the ordinary course of the debtors' operation would, nevertheless, be a benefit to the estate because it would maintain the goodwill of the employees.

So having gotten that agreement from the court and the creditor body, since no one has ever objected to that particular order, the debtor was put in a position of having the choice to pay or not pay given the benefit of maintaining employee goodwill and morale.

MR. SELIGMAN: That's correct, Your Honor. I just didn't want to suggest that somehow we're estopped because we had been paying from our decision on that basis alone. And I'm going to get to the issue of priority and 1113.

THE COURT: Okay. But let's assume that that's the case, that from the beginning this was a category of payment that the debtor could have treated as a pre-petition obligation not entitled to administrative status, but that the debtor properly obtained permission from the court pursuant to Section 363 to make the payments. The debtor had the option, in other words.

When the debtor entered into the new [116] agreement modifying the collective bargaining agreement that I approved last month, wouldn't the debtor have had the opportunity to exercise its decision to continue to make those payments?

MR. SELIGMAN: I'm not suggesting we didn't.

THE COURT: And you do right now.

MR. SELIGMAN: That's absolutely right, Your Honor. So I just wanted to make that one point.

I actually think the issue of the letter agreement entered into last month is really a red herring because our obligation stemmed from this '91 letter agreement. So – and I know that Your Honor –

THE COURT: Does plan A not include the nonqualified benefits?

MR. SELIGMAN: The way that it works is, Your Honor – and we – and I'm not suggesting that when the language said A plan full force and effect, I'm not suggesting, oh, that means we don't have to pay the nonqualified under that language. The way that it works is you have this A plan, which sets out the level of benefits. The A plan has been in existence, I don't know, 30 years, or something to [117] that effect. It's been around for a long time.

As a result of these Internal Revenue Code limitations in '91, there was this other piece of paper where we just said we're going to pay whatever nonqualified benefits you can't get –

THE COURT: Thank you. That really explains the situation. So the payments do stem, both qualified and nonqualified, from the A plan?

MR. SELIGMAN: Yes. Yes.

THE COURT: All right.

MR. SELIGMAN: Getting to the issue of 1113. Ms. Ceccotti's – announces a dichotomy between Unimet and Ionosphere. I think – doesn't point out, which I like to do, the amount of case law in the country on this issue, and the fact that Unimet is the only circuit court case to go against the debtors' position, and this – obviously there is a number of lower court Sixth Circuit decisions that –

THE COURT: Okay. What does the Seventh Circuit say?

MR. SELIGMAN: The Seventh Circuit hasn't spoken to that question. There are a number of cases in the Seventh Circuit, district court cases, which I can cite to Your Honor. There is the Moline [118] case, 144 B.R. 75.

THE COURT: Well, okay, if the Seventh Circuit hasn't spoken on it, then there really is no basis – there is no need to cite all the other cases because they would be of no more controlling impact on this courts decision than with Ionosphere.

MR. SELIGMAN: Absolutely. Absolutely. But I just wanted to emphasize to Your Honor that while she –

THE COURT: If we take a poll of courts, you win.

MR. SELIGMAN: That's correct, Your Honor. And not just in terms of the number, but in terms of what I would say the – the influence, if you will. You have the Roth American case, the Third Circuit case, 975 F.2d 949. We already mentioned the Ionosphere case. We have the Venture Resources case from the Fourth Circuit, 137 F.3d at 797, which says, quote, "A bankruptcy claim arising from the breach of a collective bargaining agreement may be accorded priority status only insofar as it fits into one of the categories singled out for preferential treatment in Section 507."

I can point out Judge Coar's decision [119] in In re Tool and Die –

THE COURT: Okay. What I would suggest, given the constraints that I'm going to be operating under

during the lunch hour, is that you give me the two or three cases that you think best support this argument.

MR. SELIGMAN: I think that the Roth American case, 975 F.2d 949.

THE COURT: Okay.

MR. SELIGMAN: The Venture Resources, 137 F.3d, and I only have the pin cite, at 797. And I think that I should also cite to Your Honor the Fleming Package Corp. case, which is a recent decision from the Central District of Illinois. It's from August of 2004, and I believe it has – it sort of discusses all of the other cases. That's 2004 Westlaw 2106579. In that case the court held, quote, "Claims for wages and benefits due under CBA are not ipso facto entitled to treatment as administrative expenses but are to be accorded priority consistent with 507."

Now, let me make the arguments that are raised by these cases, and there is a whole host of them. The point of 1113(f) – and this is set out chapter and verse in the Roth American and [120] Venture Resources and all the other cases. The point of 1113(f) is to create a process by which if the debtor seeks to reject or modify its collective bargaining agreement, it has to go through all of these steps in order to reject. And the rationale for 1113 was because it was a response to the Supreme Court's Bildisco case where the debtor essentially went under 365 and just exercised its business judgment.

But the question of priority of payments in the period between the filing of the bankruptcy and the debtors' decision to assume or reject was not addressed. And all these cases say for that determination, 1113(f) doesn't create a superpriority claim. What 11 – instead, you look

to the rules under Section 503 and Section 507. And to the extent that there would be a – viewed to be a conflict, you try and read various statutory provisions consistently with one another.

They also point out the distinction between 1113 and 1114. In 1114, it specifically says the retiree benefit obligations shall be treated as administrative claims. It says that. It also uses the words in 1114 that "the debtor shall pay." Congress –

[121] THE COURT: Okay. Mr. Seligman, I'll be looking at the cases over the lunch hour, so I don't think you need to really go into the reasoning too much. I'm really more concerned about another issue, which is you've acknowledged that the debtor had the choice pay or not pay. Throughout the history of the case, the debtor exercised the choice to pay.

Now, the necessary concomitant of that choice was that other creditors would not get the money that was paid to the employees pursuant to this agreement to pay items that might be considered pre-petition claims. So for two years you have been giving what you now call a windfall to the employees, right?

MR. SELIGMAN: No, I'm not suggesting that. I'm suggesting that in our business judgment it made sense during the course of this case – because remember, Your Honor, at the beginning of the case we were trying everything we could to not have to get to the pension issue. We were hoping that we could restructure this company without having to terminate and replace the pension plans.

THE COURT: Okay. But you're – I understand that. But here's what's happened now: [122] Having entered into an agreement with ALPA in which the debtors agreed to maintain plan A in full force and effect, the debtors now say it would be a windfall to the retiring pilots if they were to be paid the benefits to which they're entitled under plan A.

MR. SELIGMAN: I'm – what I'm saying, Your Honor, is it would be a windfall to them if they got paid, one, on these pre-petition claims, but, two, after the effective date of a termination.

THE COURT: Okay. Well, were going back to that argument now.

MR. SELIGMAN: But I don't need to go back because, you know, if it's in the companies' business judgment at the beginning of this case to pay these non-qualified benefits and to not address the pension issue because we were hoping as much as we could to not have to get into the pension issues and hoped to restructure without touching the pension, but if we now choose, as a result of the involuntary and as a result of our agreement with ALPA, that this plan is going to terminate, that these nonqualified benefits are going to go away, if we want – I don't want to suggest that we don't have the business judgment now to stop paying these [123] benefits in order so that – for this two or three-month interval between now and between the time of termination that there would be a windfall to these retired pilots. And I think that we have the business judgment to pay or to not pay, and particularly given that situation where we are now.

And I don't want to suggest – another point I wanted to make is that this language that we agreed to in this

recent agreement, it doesn't change things. Again, we had the contractual obligation under 1991. And if you look at the language of the paragraph, at Section 4(c), it sets up a construct. It says this plan is not going to go away until the bankruptcy court makes factual findings that in order to terminate the plan – in order for the company to exit bankruptcy, the plan has to be terminated. And it also had some other conditions that the plan goes away also when there is – if there is no appeals pending, save for issues of mootness on a plan of reorganization. The language could have easily been written the other way to say when these things happen, the A plan goes away. We couldn't elevate this obligation to anything other than it otherwise was in 1991.

This was not an assumption of [124] agreements. We say in our motion we're not assuming these agreements. We have throughout the course of this case on a number of occasions come in to modify an executory contract and not seek to assume and not thereby without – I don't think that, you know, any creditor would have assumed that we're elevating whatever obligations we had under the A plan to necessary administrative claims notwithstanding the termination –

THE COURT: Okay. Mr. Seligman, let's assume that what was intended by the parties was that the debtor would continue to make all the payments called for under plan A until such time as plan A was terminated, whether by a distress termination proceeding brought by United or by a proceeding brought by the PBGC. Certainly there wouldn't have been an assumption which would have required all of the payments that would ever become due to be treated as administrative claims.

But at the same time, there wouldn't be a rejection. There would be some agreement, one would think, to make all the payments called for under plan A.

MR. SELIGMAN: All I'm saying is we already had that obligation under 1991. So I'm [125] saying that this letter agreement didn't change anything as far as our contractual obligation to the CBA as opposed to an 1113 issue.

THE COURT: What language do you suppose the parties would have put in their agreement if what was intended was that United would continue to make the payments under plan A until an event of termination? I think that language that could reasonably be used is plan A will remain in full force and effect. And if the parties didn't intend that, then you're suggesting this provision in the contract was complete surplusage because it didn't change a thing.

MR. SELIGMAN: That's correct. Your Honor, it was –

THE COURT: It was complete surplusage?

MR. SELIGMAN: No, because what I'm saying is – if you read the sentence, it sets up the conditions of when the A plan goes away. And I – Your Honor, it's – whether one says –

THE COURT: But the language that it remains in full force and effect until then is surplusage.

MR. SELIGMAN: In essence, yes, because we already had the obligation way back when –

[126] THE COURT: Okay.

MR. SELIGMAN: – to maintain this thing as a practical matter. As an 1113 matter, though, a completely different situation. Now, Ms. Ceccotti suggested that these cases only come up in the context of past wage and benefit claims. That's not true. When your Honor will see the cases, they come up in a variety of different contexts. I also –

THE COURT: Okay. Which is one that involves a cessation of payments that had been made consistently throughout the case by the debtor?

MR. SELIGMAN: I think that the cases that you can look at –

THE COURT: I just want any case that involves a cessation of payments that have been made consistently through the case by the debtor.

MR. SELIGMAN: Just give me a second, Your Honor, and I will tell you.

I turn your attention to the line of cases, and I'll give you one cite, and I can get you the pin cite in a second. The Sunarhauserman case.

THE COURT: Okay. And what's the cite?

MR. SELIGMAN: I'll also cite you to the Baylys case, and I'll get you a cite, or I can get it to your clerk in a second. B-a-y-l-y-s. Those [127] cases all come up in –

THE COURT: Do you have the citations?

MR. SELIGMAN: I'll get them for you in just a second, Your Honor. That leads me, actually, to the other area where this 1113 discussion comes up quite a bit, and that's in the employee contribution context. Your Honor

has a number of briefs in front of you. And this very same issue, this $800 million issue, is also before you in the minimum funding context because one of the arguments that the independent fiduciary made is that all these minimum funding contribution obligations that we have stopped paying and that are continuing to accrue under all the plans, that these are obligations that must be paid in full under the collective bargaining agreement.

And so in those briefs, which we've attached to our -- because we didn't want to just rehash them all, they all are attached to our objection here. And they are all cases in which debtors were paying, you know, minimum funding contributions throughout the course of the case. Sometimes you had situations where, you know, the plan was frozen pre-petition, but there was continued accrued benefits. Sometimes there were [128] situations where there were no employees. But a number of them involved situations where the pension plan remained in existence during the course of the case, it was then terminated, and – I have the reference, Bayly Corp., B-a-y-l-y, 163 F.3d, and I just have the pin cite.

THE COURT: That's all right.

MR. SELIGMAN: 1208.

THE COURT: Okay.

MR. SELIGMAN: And that was also a case where, you know, it was a plan coming in and saying all of these minimum funding contributions, they're all super-priority 1113(f) claims, you've got to pay them in full. And in all of those cases the court said, no, whatever priorities they're entitled to, they're otherwise entitled to. And that's our whole basis in this case where we said we'll pay the

minimum funding contribution obligations to the extent that they are on account of services rendered to the estate post-petition.

THE COURT: Okay.

MR. SELIGMAN: But not here where you have a situation where you have pilots who retired pre-petition, provided no benefit to the – no services to the estate post-petition, and now we [129] exercise our rights not to pay under 1113. I think it would be a very – maybe "dangerous" is too strong a word, if there was a ruling that 1113(f) created a superpriority claim entitling all these payments to be made.

A debtor has a choice to assume or reject a collective bargaining agreement. We have not assumed the agreement. We've modified it a number of times. There is no harm here to rule that 1113(f) doesn't require superpriority claims because if a debtor assumes a CBA, they then have to pay as cure claims any amounts that are due under it.

But if they choose to reject, they shouldn't be worse off because they took the time throughout the course of the case, like we've taken with ALPA, like we've taken with the other unions, to try and work out a consensual resolution so that you don't force a debtor, the first thing they are in the case, to move to reject the CBA or seek 1113(e) relief so that they're not building up administrative claims because there is 1113(f) priority claims. They need to be given the time to do that so that if they choose to reject, they aren't worse off than they would otherwise be. It's no different than in the executory contract arena.

[130] So, Your Honor, I commend these cases, but I think that they clearly show that – there is the Unimet case in the Sixth Circuit, there is a bunch of lower court cases in the Sixth Circuit that have to follow Unimet.

THE COURT: And there is the Colorado Symphony case.

MR. SELIGMAN: Well, I do want to touch upon the Colorado Springs case because – oh, I have the cite for Sunarhauserman, Your Honor.

THE COURT: Okay.

MR. SELIGMAN: 184 B.R. 273. It's a bankruptcy court decision of the Northern District of Ohio. It was affirmed, and the cite on the affirmance is 126 F.3d 819.

I want to speak, Your Honor, to the Colorado Springs case. The Colorado Springs case actually supports the debtors' position. The Colorado Springs – Symphony case, I think it's Denver – Colorado Springs Symphony case Denver, what it says was that the claims that may – let me give you the facts in Colorado Springs –

THE COURT: You know what? Given the lateness of the hour, I'll just read the case.

MR. SELIGMAN: Okay. But – fine, Your [131] Honor. But it actually does support our position –

THE COURT: I'll look for anything in it that does support your position.

MR. SELIGMAN: Okay.

THE COURT: Anything else you need to argue to me, Mr. Seligman?

MR. SELIGMAN: If I could just get ten seconds. If I could just have a couple of seconds, Your Honor.

I think that's it, Your Honor.

THE COURT: Okay. Thank you.

MS. CECCOTTI: Judge, I will say a word about 1113(f) and the underlying policy of 1113(f), and I think it's important to note it here, particularly in this context. The –

THE COURT: You know, Ms. Ceccotti, I will read the cases, And I think you've already explained your position on this, so . . .

MS. CECCOTTI: I do need to –

THE COURT: If you have one brief point that you want to make, go ahead.

MS. CECCOTTI: I would like to make just a couple of brief points, and I will keep them very brief. The purpose of 1113 is to foster consensual agreements. As the court heard at some length last [132] month, the agreement that was reached here, the restructuring agreement, was such a consensual agreement, and it was done over very difficult issues. I don't think that 1113(f) should be isolated to just the Supreme Court's decision in Bildisco because 1113(f) supports the notion of reaching consensual agreements.

And if, after a consensual agreement, three days later, the company issues the letter that walks away from an aspect of that, then I don't think 1113 is served by the

interpretation that the debtor here is placing on it. So I think it's very important to note not just the one aspect of 1113(f) that arose from the Supreme Court's decision in Bildisco, but how it fits in with the overall goal of 1113(f) to foster consensual agreements.

I will say on the cases that Mr. Seligman has cited, Bayly and Sunarhauserman do have to have to do with minimum funding. We don't think we have to get dragged into the minimum funding situation at all here. Minimum funding payments are made quarterly or annually. I don't know what the facts are in those cases, but these involved post-plan termination claims. Again, I think they are very consistent with the fact pattern [133] in the sense that these are coming in as payments that are due at a particular point, months, years apart, what have you. Sunarhauserman, I think, was the PBGC trying to collect –

THE COURT: Well, it probably goes without saying that the debtor didn't enter into any letter agreement with any union proposing that it would continue to make minimum funding payments.

MS. CECCOTTI: The minimum funding has – exactly, Your Honor. It hasn't been our issue, precisely, because it hasn't been an issue with respect to the pilots' plan.

I think, unfortunately, what this comes down to is a money-saving exercise, unfortunately. And the circumstances are particularly unfortunate because the notion that the agreement – the full force and effect agreement is surplusage, an agreement that involved something that the debtors acknowledged last month before Your Honor was a significant event for them in terms of reaching a consensual agreement with us regarding the – addressing,

if you will, their desire to move towards termination of these plans. I don't think – the debtors certainly didn't minimize the importance of that to you last month, and it is [134] certainly quite disturbing to see them minimizing the importance of the full force and effect language now, which is very much an integral part of the overall agreement that was explained to Your Honor as being of benefit to the estate last month.

In terms of the – that agreement, I will point out – and, again, it does relate a bit to the Colorado springs [sic] point, but really to the matter in which the court entertained the objections and the argument in support of the restructuring agreement. We now have an agreement that sets forth the terms upon which the pilots will continue to provide services to United. The continuing in full force and effect piece of that is part of that – those compensatory terms, just like the other compensatory terms that were explained and discussed with the objectors and the debtor and with us last month, and which Your Honor overruled the notion that the compensatory provisions were excessive, and that the – that they did not result in a benefit to the estate. So I think we do have to come back to the proceedings that we had last month in terms of the importance of those provisions in the context of the agreement that was reached with the debtor.

THE COURT: Okay. Thank you.

[135] Now, we have a number of other items on the agenda besides the ones that I'm going to take under advisement during the lunch period. If it were possible to deal with some of them now and perhaps allow parties who were in the courtroom to leave now as opposed to requiring them to come back after lunch, I think that

would be considerate to them. If I could get some indication of matters that fall in that category that won't require any extensive discussion, let's see if we can't dispose of it.

MR. SPRAYREGEN: Well, Your Honor, the claims objections can be dealt with very quickly. That's 29 through 31. I think the same with respect to avoidance actions.

THE COURT: And I think the same as to fees for all professionals except Kirkland & Ellis.

MR. SPRAYREGEN: Yeah. And I think – I'm not sure that there is extensive argument even on that. I think that that will be up to the objector. So I actually think what's left, I don't know –

THE COURT: Okay. Let's try to deal with everything except the objection to the fees of Kirkland & Ellis. You've got to come back anyway, and I don't think I'm imposing an enormous burden on

* * *

[147] approve or not to object to the expenses sought. So with that one minor modification, I'll just ask that the report be approved.

THE COURT: I am going to follow the procedure that I have in each of the prior fee applications, which is to say, given the inability of my staff and myself to review these independently, I'm relying on the work of the committee and its recommendation in the absence of individual objections. The procedures that we have put in place give ample opportunity for any party that wishes to object to the recommendations of the fee review committee to do so.

There has been an objection as to Kirkland & Ellis' fees that we'll be hearing after lunch. But as to all of the others, in the absence of objection from other parties, I will, as I have in the past, enter orders in compliance with the recommendations made by the fee review committee.

MR. WOLFE: Thank you, Your Honor.

THE COURT: And I believe that's everything that we need to take care of prior to the lunch break. We'll resume at 2:15.

(Proceedings recessed to 2:15.)

THE COURT: Let us then take up first the [148] ALPA collective bargaining matter that was left over from this morning. ALPA's motion to compel payment of nonqualified pension benefits in United's response to that motion raise a number of questions. The first, resolved prior to the lunch break, was whether ALPA was required to arbitrate the question of whether the CBA between ALPA and United might be read to allow termination of these benefit payments upon a notice of termination by the PBGC of the defined benefit plan giving rise to the benefits. As discussed this morning, United's position here lacks a colorable basis.

The CBA includes provisions requiring the payment of the nonqualified benefits with no exception for periods during which a notice of termination is pending but not yet effective. With the termination of qualified benefits, the derivative obligation to pay nonqualified benefits would likewise terminate. But until that termination actually occurs, irrespective of any retroactive effective date, the obligation to make payment of nonqualified benefits is present under the CBA. A denial of that obligation by United

would be a modification of the CBA prohibited under Section 1113.

[149] That determination leaves open the question of whether the obligation to make payment of nonqualified benefits under the CBA must be treated as currently payable administrative claims or whether it might be characterized as an unsecured claim with lower priority. The parties have cited conflicting case law on the subject, which I have briefly reviewed over the break. But in the end, it is not necessary to resolve the dispute among the cases in order to rule on the pending motion.

At the outset of this case, United obtained approval of a motion to make payment of the nonqualified benefits pursuant to Section 363 of the Bankruptcy Code on the ground that even if these payments were not required, paying them outside of the ordinary course would benefit the debtors' estate. Thus, unquestionably, United had and has discretion to pay the benefits, and has done so consistently since the outset of the case.

United is currently involved in a second round of modifications to its collective bargaining agreements seeking wage concessions from its union employees in addition to those affected by an earlier round of modifications, but also, and of much greater financial impact, seeking termination [150] of defined benefit pension plans.

In connection with this second round of modifications, United and ALPA reached agreement on a modified CBA dealing with both wage concessions and pension plan termination. The agreement was subject to extensive negotiation and, after the court initially failed to approve it, renegotiation. It is very unlikely that any of the language of

the agreement would have been entered into without careful consideration.

The modified agreement uses the term, quote, "the A plan," close quote, to refer to the plan under which the nonqualified benefits at issue here are payable. The agreement deals with this plan in Section 4, which sets out detailed terms under which United may seek termination of the plan. Among them, that United may not seek termination prior to April 11, 2005, if it wishes to obtain a waiver from ALPA of its right to object that termination would violate the CBA.

Critically, Section 4(c) of the agreement provides that unless United obtains court approval of a request to terminate the plan, quote, "the A plan shall remain in full force and effect," close quote. In the context of the parties' [151] carefully bargained-for agreement, this provision can only reasonably be interpreted to require United to continue making the payments called for by the plan. Any cessation of payments by United of nonqualified benefits would not, quote, "continue," close quote, the full effect of the plan.

Thus, in entering into the modified CBA, United committed to continue making the payments at issue here. Whether this was an agreement to use the discretion accorded under Section 363 or whether the agreement merely confirmed an obligation otherwise arising under applicable bankruptcy law is an issue that need not be determined.

ALPA's motion to require a payment of the nonqualified benefits pending actual termination of the defined benefit plan is granted and an order can be entered to that effect. And, again, I can simply enter that order.

MS. CECCOTTI: Thank you, Your Honor.

THE CLERK: There is a emergency motion to expedite an adversary.

THE COURT: In addition to ALPA's motion, there was an emergency motion of the retired pilots to expedite their adversary. I believe that this [152] ruling renders that motion moot.

MR. CARRIGLIO: We would be withdrawing without prejudice our filings, Your Honor.

THE COURT: Thank you.

MR. CARRIGLIO: Thank you.

MR. SELIGMAN: Your Honor, there was just one order, if we could just ask for you to enter this, related to the DIP order as we need to get a certified copy today.

(Document tendered.)

THE COURT: Fine.

The remaining matter to be taken up is the objection to Kirkland & Ellis' fee application. I do have some notes here that I'd like to look at.

Okay. Can I have appearances, please.

MR. SPRAYREGEN: James Sprayregen on behalf of Kirkland & Ellis.

MR. RICHARD: Your Honor, Mark Richard on behalf of the International Federation of Professional & Technical Engineers, ALF-CIO.

MR. SPRAYREGEN: Stephen Wolfe. Your Honor, I'm wearing two hats. I'm here on behalf of Ira Bodenstien, United States Trustee, both as the U.S. Trustee and –

THE COURT: You'll need to speak into the [153] microphone, Mr. Wolfe.

MR. WOLFE: I'm sorry. Stephen Wolfe on behalf of Ira Bodenstein, United States Trustee as the U.S. Trustee and also as a member of the fee review committee.

THE COURT: All right. It would probably help me, Mr. Wolfe, if you would let me know what the position both of your office as a member of the fee review committee is and the United States Trustee's individual view is as of this objection to the application.

MR. WOLFE: Will do, Your Honor. We did receive the objection earlier this week. We have not – I will tell the court did not convene a meeting of the fee review committee to analyze it or vote on it. Having said that, though, Judge, I feel fairly confident in saying that the fee review committee stands by the recommendations that it made in its report.

This morning Your Honor mentioned that you do rely on the committee, and you've mentioned that in the past, and that's a responsibility that we take very, very seriously, Judge, and are doing everything in our power to justify a reliance, and certainly hope that we have done that.

* * *

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2006

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Nos. 06-1867, 06-2662, 06-2714 & 06-2843

IN THE MATTER OF:

UAL CORPORATION (PILOTS' PENSION PLAN TERMINATION)

APPEALS OF:

UNITED AIRLINES, INC.; PENSION BENEFIT GUARANTY CORPORATION; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AND UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, *et al.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 05 C 6220 (**John W. Darrah**, *Judge*) and 06 C 1222 (**Joan Humphrey Lefkow**, *Judge*).

Order

The Air Line Pilots Association, International filed a petition for rehearing in No. 06-1867 on November 7, 2006. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals[1]

> **(1)** from final judgments, orders, and decrees;
>
> **(2)** from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> **(3)** with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that –

> **(A)** there are insufficient judicial resources available in the circuit; or
>
> **(B)** establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

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[1] So in original.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and

determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless –

> **(A)** the appellant elects at the time of filing the appeal; or
>
> **(B)** any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and

decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that –

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel –

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

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29 U.S.C. § 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if –

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth –

(i) certification by an enrolled actuary –

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities

(determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that –

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of Title 26.

(B) Notice to participants and beneficiaries of benefit commitments[1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan –

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[1] So in original. Probably should be "benefit liabilities".

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from the corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if –

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that there is reason to

believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if –

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall –

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall

satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

(4) Continuing authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(5) Special rule for certain plans where cessation or change in membership of a controlled group

(A) In general

Except as provided in subparagraph (B), if –

(i) there is transaction or series of transactions which result in a person ceasing to be a member of a controlled group, and

(ii) such person immediately before the transaction or series of transactions maintained a

single-employer plan which is a defined benefit plan which is fully funded,

then the interest rate used in determining whether the plan is sufficient for benefit liabilities or to otherwise assess plan liabilities for purposes of this subsection or section 1342(a)(4) of this title shall be not less than the interest rate used in determining whether the plan is fully funded.

(B) Limitations

Subparagraph (A) shall not apply to any transaction or series of transactions unless –

(i) any employer maintaining the plan immediately before or after such transaction or series of transactions –

(I) has an outstanding senior unsecured debt instrument which is rated investment grade by each of the nationally recognized statistical rating organizations for corporate bonds that has issued a credit rating for such instrument, or

(II) if no such debt instrument of such employer has been rated by such an organization but 1 or more of such organizations has made an issuer credit rating for such employer, all such organizations which have so rated the employer have rated such employer investment grade, and

(ii) the employer maintaining the plan after the transaction or series of transactions employs at least 20 percent of the employees located in the United States who

were employed by such employer immediately before the transaction or series of transactions.

(C) Fully funded

For purposes of subparagraph (A), a plan shall be treated as fully funded with respect to any transaction or series of transactions if –

(i) in the case of a transaction or series of transactions which occur in a plan year beginning before January 1, 2008, the funded current liability percentage determined under section 1082(d) of this title for the plan year is at least 100 percent, and

(ii) in the case of a transaction or series of transactions which occur in a plan year beginning on or after such date, the funding target attainment percentage determined under section 1083 of this title is, as of the valuation date for such plan year, at least 100 percent.

(D) 2-year limitation

Subparagraph (A) shall not apply to any transaction or series of transactions if the plan referred to in subparagraph (A)(ii) is terminated under section 1341(c) or 1342 of this title after the close of the 2-year period beginning on the date on which the first such transaction occurs.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if –

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraphs (B) and (D) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 1362 of this title, certification by an enrolled actuary of –

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such dates;

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date –

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 1322(c) of this title; and

(iv) certification by the plan administrator that –

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of Title 26.

(B) Determination by the corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if –

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under Title 11 or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if –

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11 or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to

avoid unreasonably burdensome pension costs caused by declining workforce

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that –

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(D) Disclosure of termination information

(i) In general

A plan administrator that has filed a notice of intent to terminate under subsection (a)(2) of this section shall provide to an affected party any information provided to the corporation under subsection (a)(2) of this section not later than 15 days after –

(I) receipt of a request from the affected party for the information; or

(II) the provision of new information to the corporation relating to a previous request.

(ii) Confidentiality

(I) In general

The plan administrator shall not provide information under clause (i) in a form that includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(II) Limitation

A court may limit disclosure under this subparagraph of confidential information described in section 552(b) of Title 5, to any authorized representative of the participants or beneficiaries that agrees to ensure the confidentiality of such information.

(iii) Form and manner of information; charges

(I) Form and manner

The corporation may prescribe the form and manner of the provision of information under this subparagraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(II) Reasonable charges

A plan administrator may charge a reasonable fee for any information provided under this subparagraph in other than electronic form.

(iv) Authorized representative

For purposes of this subparagraph, the term "authorized representative" means any employee organization representing participants in the pension plan.

(3) Termination procedure

(A) Determinations by the corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities

If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall –

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 1342 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit liabilities which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If

the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this title.

(D) Administration of the plan during interim period

(i) In general

The plan administrator shall –

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) of this section and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements

The requirements of this clause are met by the plan administrator if the plan administrator –

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency

For purposes of this section –

(1) Sufficiency for benefit liabilities

A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits

A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on the conversion of a defined benefit plan to a defined contribution plan

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that –

(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all

such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter –

> **(A)** upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree

that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(3) Disclosure of termination information

(A) In general

(i) Information from plan sponsor or administrator

A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation

The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure

The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after –

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality

(i) In general

The plan administrator and plan sponsor shall not provide information under subparagraph (A)(i) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation

A court may limit disclosure under this paragraph of confidential information described in section 552(b) of Title 5, to authorized representatives (within the meaning of section 1341(c)(2)(D)(iv) of this title) of the participants or beneficiaries that agree to

ensure the confidentiality of such information.

(D) Form and manner of information; charges

(i) Form and manner

The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges

A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power –

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power –

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means –

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section[1] part 1 of subtitle E of this subchapter,

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of Title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

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[1] So in original.

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of Title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue

process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.